No. 96-1395-CFX
Status: GRANTED

Docketed:
March 5, 1997

Title: James B. King, Director, Office of Personnel Management, Petitioner
v.
Lester E. Erickson, Jr., et al.
and
James B. King, Director, Office of Personnel Management, Petitioner
v.
Harry R. McManus, et al.

Court: United States Court of Appeals for the Federal Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Marth,Paul E., Bonney,Neil C., McManus,Harry R., Koch,John R., Litchford,Jody M.

Entry	Date	Note	Proceedings and Orders
1	Jan 23 1997	G	Application (A96-529) to extend the time to file a petition for a writ of certiorari from February 2, 1997 to March 4, 1997, submitted to The Chief Justice.
2	Jan 27 1997		Application (A96-529) granted by the Chief Justice extending the time to file until March 4, 1997.
3	Mar 4 1997	G	Petition for writ of certiorari filed. (Response due June 6, 1997)
4	Apr 4 1997		Brief of respondent Sharon Kye in opposition filed.
5	Apr 8 1997		Waiver of right of respondent Lester E. Erickson, Jr. to respond filed.
6	Apr 22 1997		DISTRIBUTED. May 8, 1997 (Page 12)
7	Apr 30 1997	F	Response requested -- JPS.
8	May 27 1997		Order extending time to file response to petition until June 6, 1997.
11	Jun 5 1997		Brief of respondent Lester E. Erickson, Jr. in opposition filed.
9	Jun 6 1997		Brief of respondent Jeanette Walsh in opposition filed.
10	Jun 6 1997	G	Motion of respondent Jeanette Walsh for leave to proceed in forma pauperis filed.
12	Jun 10 1997		REDISTRIBUTED. June 26, 1997 (Page 2)
13	Jun 27 1997		Motion of respondent Jeanette Walsh for leave to proceed in forma pauperis GRANTED.
14	Jun 27 1997		Petition GRANTED. SET FOR ARGUMENT December 2, 1997. **********
15	Jul 15 1997	G	Motion of the Acting Solicitor General to dispense with printing the joint appendix filed.
17	Aug 8 1997	G	Motion of International Association of Chiefs of Police, Inc. for leave to file a brief as amicus curiae filed.
16	Aug 11 1997		Brief of petitioner James King, Director, Office of Personnel Management filed.
18	Sep 5 1997		Brief of respondent Jeanette Walsh filed.
20	Sep 8 1997		Brief of respondent Sharon Kye filed.
21	Sep 11 1997		Brief of respondent Lester E. Erickson, Jr. filed.
19	Sep 12 1997		Motion of the Acting Solicitor General to dispense with

2 pp

No. 96-1395-CFX

Entry	Date	Note	Proceedings and Orders
			printing the joint appendix GRANTED.
23	Sep 29 1997		Motion of International Association of Chiefs of Police, Inc. for leave to file a brief as amicus curiae GRANTED.
24	Oct 17 1997		Reply brief of petitioner Janice LaChance, Acting Director, OPM filed.
26	Nov 6 1997		CIRCULATED.
25	Nov 18 1997		Record filed.
		*	Record proceedings U.S. Court of Appeals for the Federal Circuit (1 box).
27	Dec 2 1997		ARGUED.

No.

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

LESTER E. ERICKSON, JR., ET AL.

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

HARRY R. MCMANUS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
SETH P. WAXMAN
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
DAVID M. COHEN
TODD M. HUGHES
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

LORRAINE LEWIS
General Counsel
STEVEN E. ABOW
JOSEPH E. MCCANN
ANA A. MAZZI
Attorneys
Office of General Counsel
Office of Personnel Management
Washington, D.C. 20415

QUESTION PRESENTED

Whether the Due Process Clause precludes a federal agency from sanctioning an employee for making false statements to the agency regarding allegations that the employee had engaged in employment-related misconduct.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the parties to the proceedings in the Federal Circuit were Jeanette M. Walsh, Michael G. Barrett, Jerome K. Roberts, Sharon Kye, and the Merit Systems Protection Board.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued:

Constitution, statutes and regulations:

Statutes and regulations—Continued:

In the Supreme Court of the United States

OCTOBER TERM, 1996

No.

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

LESTER E. ERICKSON, JR., ET AL.

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

HARRY R. MCMANUS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of James B. King, the Director of the Office of Personnel Management, respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Federal Circuit in these cases.

OPINIONS BELOW

The decision of the court of appeals in *King* v. *Erickson* (App., *infra*, 1a-23a) is reported at 89 F.3d 1575. The decision of the court of appeals in *King* v. *McManus* (App., *infra*, 24a-28a) is unpublished. The

decision of the Merit Systems Protection Board (MSPB) in *Walsh* v. *Department of Veterans Affairs* (App., *infra*, 29a-49a) is reported at 62 M.S.P.R. 586. The decision of the MSPB in *Erickson* v. *Department of the Treasury* (App., *infra*, 50a-58a) is reported at 63 M.S.P.R. 80. The decision of the MSPB in *Kye* v. *Defense Logistics Agency* (App., *infra*, 59a-69a) is reported at 64 M.S.P.R. 570. The decision of the MSPB in *Barrett* v. *Department of the Interior* (App., *infra*, 70a-96a) is reported at 65 M.S.P.R. 186. The decision of the MSPB in *McManus* v. *Department of Justice* (App., *infra*, 97a-105a) is reported at 66 M.S.P.R. 586.

JURISDICTION

The judgment of the court of appeals in *King* v. *Erickson* was entered on July 16, 1996. The judgment of the court of appeals in *King* v. *McManus* was entered on July 22, 1996. The petitions for rehearing in both cases were denied on November 4, 1996. App. *infra*, 106a-109a. On January 27, 1997, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including March 4, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment provides: "[N]or [shall any person] be deprived of life, liberty, or property, without due process of law."

STATEMENT

These two cases arise from a total of five separate disciplinary proceedings against government employees. Each employee appealed his or her discipline to the Merit Systems Protection Board (MSPB). In

each case, the MSPB upheld an underlying charge of misconduct but reversed a charge that the employee had made false statements regarding the misconduct. In light of that reversal, the MSPB also mitigated the sanction imposed in each case. The Federal Circuit affirmed each of those decisions.

1. a. *Walsh.* Respondent Jeanette Walsh was employed as a Social Services Assistant at a medical center operated by the Department of Veterans Affairs in St. Cloud, Minnesota. She was charged with having sexual relations with a patient and other misconduct. App., *infra*, 2a. An administrative judge found that the charges had not been proven. *Id.* at 30a. The MSPB reversed in part, finding that, "while employed as a social services assistant, [Walsh] engaged in sexual relations with an alcohol-dependent patient at the agency medical center." *Id.* at 41a. The MSPB found that the relations began when the patient was an inpatient, as early as September 1988, and continued after he became an outpatient in November 1988. *Id.* at 34a-37a. The MSPB noted that her misconduct "was intentional and continued for some 18 months." *Id.* at 42a.

Walsh was also charged with making false statements concerning her relationship with the patient, a charge that the administrative judge affirmed. That charge was based on inconsistent statements Walsh had given to her employer. In a December 1988 meeting with a supervisor, Walsh had acknowledged having an intimate relationship with the patient at that time. App., *infra*, 2a. Later, in a 1991 affidavit, Walsh stated that during the December 1988 meeting she had denied having an intimate relationship with the patient. *Ibid.* Moreover, she consistently stated that she had not had any relationship with the patient

while he was an inpatient—*i.e.*, during the period from April 1988 through November 1, 1988. *Id.* at 3a.

The MSPB did not dispute that Walsh had made false statements regarding her misconduct. Relying on a new reading of the Federal Circuit's decision in *Grubka* v. *Department of the Treasury*, 858 F.2d 1570, 1475 (1988), however, the MSPB held that an agency may not "separately charge an employee with misconduct and making false statements or a similar offense regarding the alleged misconduct." App., *infra*, 41a. That result was necessary, in the MSPB's view, to protect the employee's "due process right to have an opportunity to be heard on a charge, and not to have a falsification type charge automatically sustained by virtue of the sustaining of an underlying charge." *Id.* at 40a. For the same reason, the MSPB held that Walsh's false statements could not be considered as aggravating factors that would increase the penalty imposed on Walsh for the charge of misconduct the MSPB sustained. *Id.* at 42a. Reviewing the sanction imposed on Walsh in light of its reversal of the falsification charge, the MSPB substituted a 90-day suspension for the penalty of removal that the agency had imposed.

Chairman Erdreich filed a concurring opinion. App., *infra*, 45a-49a. In his view, the principle that "an employee may give an untrue denial statement in response to an agency investigation * * * without the possibility of discipline for that statement * * * seems to conflict with several mandates that require a federal employee to be truthful in dealings with his federal employer." *Id.* at 45a. That leads to the "anomalous result that an employee may be required to respond to an agency inquiry, but may not be required to respond truthfully." *Id.* at 46a. It also

"give[s] federal employees a privilege not accorded to ordinary citizens who 'may decline to answer the question, or answer it honestly, but [who] cannot with impunity knowingly and willfully answer with a falsehood.'" *Id.* at 46a-47a (quoting *Bryson* v. *United States*, 396 U.S. 64, 72 (1969)). Expressing his "concerns about how this decision * * * affects the standards of employee conduct basic to the ethical underpinnings of our federal civil service," *id.* at 49a, Chairman Erdreich nonetheless concurred on the ground that *Grubka* and a later Federal Circuit decision compelled that result. See *ibid.*

b. *Erickson.* Respondent Lester Erickson, Jr., was employed as a Supervisory Police Officer with the Bureau of Engraving and Printing. The agency had apparently been suffering from a series of "Mad Laugher" harassing telephone calls, in which someone would anonymously call agency employees during work hours, laugh continuously, and then hang up. Erickson was charged with having encouraged an employee of an agency contractor to make a "Mad Laugher" call to an agency police officer. App., *infra*, 5a. The MSPB sustained that charge of misconduct. *Id.* at 7a, 54a-55a.

Erickson was also charged with making a false statement in a matter of official interest, in violation of the agency's minimum standards of conduct. App., *infra*, 52a. That charge was based on Erickson's responses to a series of questions posed by an agency investigator regarding the "Mad Laugher" calls. In particular, Erickson had stated that he "never participated" in the calls; that he "d[id] not know who" was making the calls; and that he "do[es] not know the true identification of the 'Mad Laugher.'" *Id.* at 5a-6a, 52a. Erickson added that "[i]n my opinion it is

95% of the police unit [and] also possibly personnel in Production." *Id.* at 6a, 52a-53a.

Based on its decision in *Walsh*, the MSPB did not sustain the false statement charge, stating that "[a]n agency may not charge an employee with falsely denying misconduct when it is separately charging the employee with the underlying misconduct." App., *infra*, 53a. The MSPB accordingly mitigated the sanction of removal to a 15-day suspension. *Id.* at 54a-55a.

c. *Kye*. Respondent Sharon Kye was employed as a Supervisory General Supply Specialist for the Defense Logistics Agency. She was charged with failing to safeguard a government Diners Club credit card, failing to follow instructions for reporting loss, theft, or compromise of the card, and misuse of the card. The card was used on more than 29 different occasions during March 1993 to make improper cash withdrawals from ATM machines amounting to more than $2,000. Initial Decision at 2. In addition, Kye used the card for the rental of a motel room on March 31, 1993, and the agency produced the motel registration form signed by Kye. *Id.* at 9. Kye was not authorized to use the card at all during that period, because she was not on official travel. *Id.* at 2. The MSPB sustained the charges of misconduct. App., *infra*, 59a-67a.

Kye was also charged with providing false information in an official investigation. She repeatedly maintained that she had not herself used the card for any of the improper charges. In addition, she told an agency investigator on one occasion that she had lost possession of the card while it was being misused, but that she had torn it up as soon as she regained possession of it, on April 2 or 3, 1993. Initial Decision

at 5. At a later interview, she stated that she did not have possession of the card in early April 1993, but that she had in fact torn it up during the middle of April. *Id.* at 6. In fact, the evidence showed that she had the card in her possession on March 31, when she used it at the motel. *Id.* at 9.

Based on its decision in *Walsh*, the MSPB did not sustain the false statement charge. App., *infra*, 63a. The MSPB accordingly mitigated the sanction of removal to a 45-day suspension. *Id.* at 63a-64a. Member Amador dissented from the decision to mitigate the sanction, on the ground that the charges that had been sustained were sufficient to warrant the sanction of removal. *Id.* at 67a-69a.

d. *Barrett and Roberts*. Respondents Michael Barrett and Jerome Roberts were employed as Soil Scientists by the Department of the Interior. In June 1988, they left their duty stations in a government pickup truck to build a fish pond in the backyard of their supervisor's house. They did not take leave for the time they were not on duty. App., *infra*, 9a, 71a. As a result of that incident, they were charged with making a false claim on their time and attendance reports when they represented that they had been on duty during the period that they had been assisting with the fish pond. *Id.* at 85a.

Barrett and Roberts also were charged with misrepresentation or concealment of a material fact in connection with an investigation. When the agency personnel officer had inquired about the alleged misconduct, "Roberts stated in response to the inquiry that he did not remember anything about the building of a fish pond, while Barrett stated that he only worked on the fish pond on his own time." App., *infra*, 86a. The administrative judge had found that those

statements were false. In addition, Barrett and Roberts were charged with failing to report an act of fraud, waste, and abuse "when they failed to disclose to agency officials that [their supervisor] did not charge them leave for the time that they worked on the fish pond." *Ibid.* The administrative judge sustained that charge as well.

Based on its decision in *Walsh*, the MSPB did not sustain the false statement charge. App., *infra*, 86a-87a. In addition, the MSPB held that for similar reasons the charge of failure to report an act of fraud also could not be sustained. *Id.* at 87a. In the MSPB's view, respondents' disclosure of the fraud "would have necessitated implicating themselves in the misconduct of filing a false time and attendance report." *Ibid.* The MSPB concluded that "[a] charge based on such a requirement of self-implication is contrary to * * * *Walsh*" and therefore had to be reversed as well. *Ibid.* Accordingly, the MSPB substituted a letter of reprimand for the demotions and 30-day suspensions the agency had imposed on Barrett and Roberts. *Id.* at 71a, 88a-89a. Member Amador dissented in part, stating that the appropriate punishment in his view was a 30-day suspension. *Id.* at 91a-96a.

e. *McManus.* Respondent Harry McManus was employed as a Supervisory Correctional Officer with the Department of Justice. He was charged with conduct unbecoming a supervisor, based on various sexual comments he had made to a female correctional officer. For example, he had referred to her bra size, had asked her about her preferred sexual positions, told her he had a "bulge" in his pants when thinking about that subject, and asked whether the female officer could see how much she excited him. App., *infra*, 98a. The MSPB affirmed the administrative judge's findings that McManus had engaged in misconduct. *Id.* at 97a-105a.

McManus also was charged with making false statements during the agency's investigation. During an initial interview, McManus had denied having told the female officer that he was disappointed she had not called one evening when they were on duty together; he denied having stated that "he would have [the female officer] relieved so that she could come over to [McManus's post] and tease him more"; he "flatly denied discussing the subject of preferred sexual positions" with the female officer; and he "denied that he told [the female officer] that he had a bulge (in his pants) while talking with her." App., *infra*, 25a-26a. In a later interview he admitted that in fact he made all of those statements. *Ibid.*

Based on its decision in *Walsh*, the MSPB did not sustain the false statement charge. App., *infra*, 100a. The agency argued that the MSPB should nonetheless take McManus's false statements into account in assessing his credibility when he denied that the female officer had ever specifically discouraged his remarks. That testimony contradicted statements by the female officer that, although she initially participated in the sex-related joking, she later told McManus to stop. The MSPB, however, categorically "decline[d] to consider [McManus's] false statement in analyzing the penalty issue"—even for such impeachment purposes. *Ibid.* The MSPB accordingly substituted a 14-day suspension for the demotion the agency had imposed on McManus. *Id.* at 103a.

2. In its decision in *Erickson*, the court of appeals considered appeals from the MSPB's decisions regarding Erickson, Walsh, Barrett and Roberts, and

Kye. App., *infra*, 1a-23a. Relying on "procedural due process concerns," *id.* at 20a, the court held "that an agency may not charge an employee with falsification or a similar charge on the ground of the employee's denial of another charge or of underlying facts relating to that other charge," *id.* at 21a.

The court initially noted "that the government employees here had a protected property interest in their employment," App., *infra*, 10a, and that they were therefore entitled both under applicable statutes and under the Due Process Clause to notice and a meaningful opportunity to be heard before adverse action is taken against them, *id.* at 10a-11a (citing 5 U.S.C. 7513(b)). The court agreed with the MSPB that its earlier *Grubka* decision was correctly interpreted to hold "that an employee's denial of the factual basis of a [misconduct] charge may not be used as the basis for a falsification charge." *Id.* at 15a.

The court also rejected the suggestion that there should be any distinction between denying an allegation of misconduct and denying the facts underlying the allegation. In the court's view, "[a]llowing an agency to charge an employee with falsely denying facts underlying a misconduct charge would deprive the employee of a *meaningful* opportunity to respond to the charges." App., *infra*, 16a. The court noted that "employees might be reluctant to deny charges for fear that their denials would be construed as denials of facts, which in OPM's view would subject them to an additional falsification charge." *Ibid.* The court also stated that if falsification charges were permitted in this context, employees could be "coerced into admitting the misconduct, whether they believe that they are guilty or not, in order to avoid the more severe penalty of removal possibly resulting

from a falsification charge." *Id.* at 16a-17a. In the court's view, that "would create a 'chilling effect' on their clear right to defend themselves, a 'Catch-22' situation for employees that is inconsistent with the due process right provided by federal law to enable them to defend themselves." *Id.* at 17a.

The court stated that its holding did not "mean * * * that an employee has a right to lie or affirmatively mislead an agency engaged in an investigation." App., *infra*, 17a. The court stated that "[b]eyond a denial of a charge or of the factual accusations supporting a charge, an employee may not make up a false story, or tell 'tall tales' in order to defend against a charge." *Ibid.* The court also stated that "when the agency is in an investigatory mode, prior to charges having being brought," and "when investigations are conducted concerning the conduct of other employees, false statements are actionable." *Id.* at 18a.

Applying the above principles, the court of appeals affirmed the MSPB's decisions in each of the cases before it. In Walsh's case, the court held that the employee's statements were "mere denials of having an intimate relationship with the patient" and were therefore insufficient to support a false statement charge. App., *infra*, 22a. In Erickson's case, the court affirmed the MSPB's decision because the employee's denials of having knowledge of or participating in the "Mad Laugher" calls "were denials of having engaged in such conduct" and "were thus not otherwise false." *Ibid.* In Kye's case, the court held that the employee's denials of having misused the credit card and her other statements "in effect were * * * denials and were not actionable false statements." *Id.* at 23a. Finally, in Barrett's and

Roberts' case, the court held that the employees' statements that "they knew nothing of the events in question" were not actionable because they were "in essence * * * denial[s] and w[ere] not otherwise false." *Ibid.*

3. Eight days after its decision in *Erickson*, the Federal Circuit decided *McManus* in an unpublished decision. App., *infra*, 24a-28a. The court relied on its decision in *Erickson* to hold that the employee's denials of having made sexual comments to the female officer "were within the range of denials that must be permitted in order to make meaningful the right to respond to charges." *Id.* at 28a. Accordingly, the court concluded that "the board did not err in reversing the falsification charge against McManus." *Ibid.*

REASONS FOR GRANTING THE PETITION

Before the government may deprive one of its employees of a protected property interest in employment based on an allegation of misconduct, the employee must ordinarily be given notice and an opportunity to be heard on the charges. The employee's right to a meaningful opportunity to be heard, however, has never been understood to include the right to make false statements with impunity during an agency investigation. To the contrary, the court of appeals' conclusion is inconsistent with settled principles that the Constitution contains no right to lie. Because the court of appeals' decision threatens to do substantial damage to the ethical underpinnings of the civil service and represents an unjustifiable judicial intrusion into the proper scope of federal employee discipline, further review is warranted.

1. The basic holding of the court of appeals in these cases is unequivocal: "an agency may not charge an employee with falsification or a similar charge on the ground of the employee's denial of another charge or of underlying facts relating to that other charge." App., *infra*, 21a. That ruling creates a right to lie for federal employees suspected of on-the-job wrongdoing. Although the court of appeals recognized that "the agency is entitled to truth-telling" in some circumstances, *id.* at 18a, the holding of the court of appeals is that federal agencies are not so entitled when their employees face allegations of misconduct.

The court of appeals accorded an extraordinary breadth of protection to the right that it created. The Federal Circuit held not only that the employee's false statements may not serve as a distinct ground for discipline, but also that "[d]enials of charges and related facts may not be considered in determining a penalty" for the underlying misconduct. App., *infra*, 21a. Thus, if the employee's misconduct is proven, the agency may not take the employee's false statements into account in settling upon the appropriate sanction; the agency must treat the employee as if the employee had been entirely honest and forthcoming throughout the investigation. Moreover, although an employee who makes false statements regarding the misconduct of others apparently remains subject to discipline, see *id.* at 18a, an employee who takes the same action to cover up his own misconduct cannot be made to suffer any consequences on that account.

2. The Federal Circuit asserted that the protection it was granting to false statements was limited. The court stated that its holding "does not mean * * * that an employee has a right to lie or affirmatively mislead an agency engaged in an investiga-

tion." App., *infra*, 17a. The court added that "an employee may not make up a false story, or tell 'tall tales' in order to defend against a charge," and that "falsehoods which go beyond denial and defense are actionable by an agency as falsification." *Ibid.* Those statements do not, however, mitigate the untoward consequences of the court's rule.

First, the Federal Circuit's assurances that an agency may still sanction "affirmative[] mislead[ing]" or "falsehoods which go beyond denial and defense" are of limited value in light of the court's treatment of the cases before it. Respondent Erickson, for example, not only denied having made the "Mad Laugher" calls, but added that "[i]n my opinion it is 95% of the police unit [and] also possibly personnel in Production" who made the calls. App., *infra*, 6a. Respondent Kye falsely stated that she did not have possession of the credit card during the time it had been misused and that she had torn the credit card up as soon as she regained possession of it, on April 2 or 3, 1993. She then stated (again falsely) that she had in fact torn it up during the middle of April. All of those statements were more than mere "denials" and amounted to efforts to "affirmatively mislead" the agency. Yet the Federal Circuit nonetheless held that the Constitution precluded the agencies involved from bringing charges based on those false statements or taking the false statements into account in any way in determining the appropriate discipline.

Second, the line between "affirmative misstatements" or "tall tales," on the one hand, and mere "denial and defense," on the other, is inherently unstable. Government agencies as employers will generally ask their employees a wide range of questions regarding their on-the-job activities, particularly when misconduct is suspected. Such questions frequently require an employee who wants to retain credibility while falsely denying misconduct to make other false statements about related matters as well. In those circumstances, protection for the false denials necessarily shades over into protection for the affirmative misstatements.[1]

---

[1] The rule adopted by the Federal Circuit is similar in some respects to the so-called "exculpatory no" doctrine, which has been used by some courts of appeals to preclude the application of the federal criminal false statement statute, 18 U.S.C. 1001, to mere exculpatory denials of wrongdoing. But see *United States* v. *Rodriguez-Rios*, 14 F.3d 1040, 1044-1045 (5th Cir. 1994) (en banc) (rejecting doctrine); *United States* v. *Wiener*, 96 F.3d 35, 37 (1996) (same), opinion supplemented on other grounds, Nos. 95-1294, 95-1403, 95-1597, 1996 WL 531009 (2d Cir. Sept. 16, 1996); cf. *United States* v. *LeMaster*, 54 F.3d 1224, 1227-1230 (6th Cir. 1995), cert. denied, 116 S. Ct. 701 (1996). The experience of the courts that have applied that doctrine is instructive. Although the courts that accept the doctrine routinely recite that the doctrine protects only exculpatory denials and does not extend to affirmative misstatements, the lines they have attempted to draw between the two categories of false statements are not stable. Compare, *e.g.*, *United States* v. *Moore*, 27 F.3d 969, 979-980 (4th Cir.) (holding that "exculpatory no" doctrine did not protect a defendant's denials that a signature was his, that he had prepared certain tax returns, and that he had ever prepared similar tax returns), cert. denied, 115 S. Ct. 459 (1994), and *United States* v. *Holmes*, 840 F.2d 246, 249 (4th Cir.) (holding that signing a document with a false name is not protected by "exculpatory no" doctrine), cert. denied, 488 U.S. 831 (1988), with *United States* v. *Myers*, 878 F.2d 1142, 1143, 1144 (9th Cir. 1989) (holding that "exculpatory no" doctrine protected a defendant who "concocted a story about the [defendant] losing his contact lenses while in flight and, as a result, inadvertently flying into prohibited airspace") and *United States* v. *Equihua-Juarez*, 851 F.2d 1222, 1224-1227 (9th Cir. 1988) (holding that "exculpatory no" doc-

Third, and perhaps most important, even if the Federal Circuit's rule could effectively be limited in the ways suggested by that court, the rule would still confer a broad and unwarranted immunity on federal employees who make false statements. Under any version of the Federal Circuit's rule, federal employees would have substantial latitude to make false statements to their agencies about their on-the-job conduct. Indeed, the recognition of even a limited constitutional right to deceive represents an unwarranted intrusion on the discretion of the government to determine under what circumstances on-the-job misconduct by government employees—including on-the-job dishonesty—should lead to disciplinary action.[2]

3. The court of appeals squarely rested its holdings on the Due Process Clause of the Fifth Amend-

---

trine protects defendant who provided a false name to federal investigators).

[2] In a further effort to limit its ruling, the Federal Circuit stated that "when the agency is in an investigatory mode, prior to charges having been brought, the agency is entitled to truth-telling by its employees." App., *infra*, 18a. In each of the cases at issue here, however, the employee made some or all of the false statements in the course of an agency investigation, *i.e.*, before a notice of adverse action under 5 U.S.C. 7513(b)(1) was sent to the employee. Indeed, the Federal Circuit's own descriptions of several of the false statements essentially acknowledge as much. See App., *infra*, 5a (Erickson made false statements "when responding to a list of questions from an agency investigator"), 9a (Barrett and Roberts "provided false information in response to the agency's inquiry"), 25a (McManus made false statements "when McManus was interviewed during the agency's investigation"). Nonetheless, the court held that each of the employees could not be disciplined for the false statements.

ment. The court began its discussion in *Erickson* by quoting that Clause. See App., *infra*, 10a. The court then cited to *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 546 (1985), a leading case from this Court holding that the Due Process Clause grants employees who have property interests in their government employment a meaningful opportunity to be heard before they may be deprived of those interests. See App., *infra*, 11a. Throughout its opinion, the court relied on the constitutional right to "a meaningful opportunity to respond," *id.* at 16a (emphasis omitted), and "the due process right provided by federal law," *id.* at 17a, as the bases for its rule.[3] Although the court did in one place quote the statute providing employees charged with misconduct with "a reasonable time * * * to answer orally and in writing," see 5 U.S.C. 7513(b)(2), the court did so simply to note that "compliance with the[] [statutory] procedures satisfies the minimum due process requirements to which the employee is entitled." App., *infra*, 11a. The court did not suggest that the statute itself grants an employee a right to make false denials, and nothing in the statutory language would support creation of such a right.

The court of appeals' derivation of a right to make false statements from constitutional procedural due process principles has no foundation in the decisions of this Court. No decision of this Court addressing the scope or nature of the due process right to a

---

[3] See App., *infra*, 17a ("meaningful opportunity to respond"), 19a ("due process requires that an employee be allowed to deny both a charge and the underlying facts without being subject to a falsification charge"), 20a ("the holding in *Grubka* was based on procedural due process concerns").

meaningful opportunity to be heard has suggested that it includes the right to make false statements with impunity.[4] In *Loudermill*, for example, the Court discussed "'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'" 470 U.S. at 542 (quoting *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971)). Nothing in *Loudermill* suggests that the right to a hearing extends to the right to make false statements at such a hearing. Nor does any other case from this Court suggest that the purely procedural right to a meaningful opportunity to be heard includes a substantive right limiting the government's ability to sanction employees who make false statements.[5]

4. The Federal Circuit's decision conflicts with decisions of this Court making clear that the Constitution does not recognize a right to lie and that an individual who chooses to answer questions by making false statements may be made to suffer penalties on that account. In *Bryson* v. *United States*, 396 U.S. 64 (1969), the Court stated the governing legal principle:

---

[4] See, *e.g.*, *Washington* v. *Harper*, 494 U.S. 210, 228-236 (1990); *FDIC* v. *Mallen*, 486 U.S. 230, 240-248 (1988); *Hewitt* v. *Helms*, 459 U.S. 460, 472-477 (1983); *Vitek* v. *Jones*, 445 U.S. 480, 494-496 (1980); *Mathews* v. *Eldridge*, 424 U.S. 319, 339-349 (1976); *Goss* v. *Lopez*, 419 U.S. 565, 577-584 (1975); *Wolff* v. *McDonnell*, 418 U.S. 539, 563-572 (1974); *Goldberg* v. *Kelly*, 397 U.S. 254, 266-271 (1970); *Greene* v. *McElroy*, 360 U.S. 474, 496-497 (1959); *Morgan* v. *United States*, 304 U.S. 1, 14-15, 18-22 (1938)

[5] The Court recognized that in some circumstances, "a post-deprivation hearing will satisfy due process requirements." 470 U.S. at 542 n.7.

"Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." *Id.* at 72 (footnote omitted). The court explained that "[a] citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood." *Ibid.* See also *Glickstein* v. *United States*, 222 U.S. 139, 142 (1911) (Fifth Amendment "does not endow the person who testifies with a license to commit perjury").

Although the Court enunciated those principles in a criminal case, they apply equally in this context. In one respect, government employees are in a different position from most individuals in a criminal setting who may assert their privilege against compelled self-incrimination in response to questions; government employees have an obligation to cooperate with their employer and therefore do not have the option of simply remaining silent. See, *e.g.*, *Kalkines* v. *United States*, 473 F.2d 1391 (Ct. Cl. 1973). But that difference does not suggest that government employees should be given a compensating right to respond to questions with false statements. If an employee does not want to answer questions honestly regarding his on-the-job misconduct—*i.e.*, if the employee is unable to fulfill a basic condition of the employee-employer relationship—the employee may refuse to answer and suffer whatever penalties ensue. In any event, even if the federal employee were viewed as having been compelled to answer questions, that would not affect the analysis. In the criminal context, too, even an individual who is compelled to provide the government information—on a form required by the National Labor Relations Board, as in *Bryson*, on a wagering tax form, as in *United States* v. *Knox*, 396

U.S. 77, 79 (1969), or because he has been granted use immunity for his testimony, see *United States* v. *Apfelbaum*, 445 U.S. 115, 126-127 (1980)—"must testify truthfully or suffer the consequences." *United States* v. *Havens*, 446 U.S. 620, 626 (1980).

In *United States* v. *Dunnigan*, 507 U.S. 87 (1993), this Court held that Sentencing Guidelines Section 3C1.1, which requires an enhancement of the defendant's sentence if the defendant commits perjury at trial, does not "undermine[]" the constitutional right to testify. 507 U.S. at 96. The Court noted that the "right to testify does not include a right to commit perjury." *Ibid.* (citing *Nix* v. *Whiteside*, 475 U.S. 157, 173 (1986); *United States* v. *Havens*, 446 U.S. at 626; *United States* v. *Grayson*, 438 U.S. 41, 54 (1978)). The Court also noted that the Guidelines provision does not "distort[] [the defendant's] decision whether to testify or remain silent," since there is no "categorical ban on every governmental action affecting the strategic decisions of an accused, including decisions whether or not to exercise constitutional rights." *Ibid.*

The right to testify addressed by the Court in *Dunnigan* has its roots in large part in the same due process principles that produce the right to a meaningful opportunity to be heard relied upon by the Federal Circuit in this case. See *Rock* v. *Arkansas*, 483 U.S. 44, 51 & n.9 (1987). Consequently, the principle of *Dunnigan* that the right to testify does not include a right to testify falsely conflicts with the Federal Circuit's holding that the right to a meaningful opportunity to be heard *does* include the right to make false statements. Indeed, the specific holding of *Dunnigan* that a defendant's sentence may be enhanced for false testimony is irreconcilable with

the Federal Circuit's conclusion that "one can hardly justify enhancing a misconduct penalty because of * * * falsification." App., *infra*, 21a.[6]

---

[6] The court of appeals' attempts to distinguish *Dunnigan* are unavailing. The court first stated that *Dunnigan* "only dealt with enhancement of a sentence in a criminal context, where there is a heavier burden of proof than agencies have in proving charges of falsification against employees." App., *infra*, 21a. That account is wrong. The burden of proof in the federal criminal *sentencing* context is ordinarily precisely the same preponderance-of-the-evidence standard that applied to the charges of falsification in these cases. See *United States* v. *Watts*, 117 S. Ct. 633, 637 (1997) (per curiam) (citing Sentencing Guidelines § 6A1.3 commentary). In any event, the heavier burden of proof in criminal cases is a reflection of the fact that the defendant's liberty—and not merely a property interest—is at stake. Even if criminal sentencing determinations had to be supported by a higher burden of proof, that would have no bearing on the question whether a defendant—or, in this case, a government employee—may suffer additional sanctions for making false statements.

The court of appeals also stated that "the crime of perjury consists of lying under oath, a much more serious offense than violation of 5 C.F.R. § 5.4 [which requires federal employees to cooperate with investigations and to testify truthfully], thereby justifying a penalty beyond that levied on the basic offense." App., *infra*, 21a. Under *Dunnigan*, however, a federal court may impose a longer sentence, thereby depriving a defendant of liberty, on account of false statements made at trial that materially affect the prosecution. If the Due Process Clause does not forbid imposition of that consequence on those who testify falsely at trial, it surely does not prohibit the much less severe sanctions at issue here. Moreover, the Guidelines provision at issue in *Dunnigan* permits an enhancement not only for perjury at trial, but also for unsworn false statements that obstruct an investigation, similar to the false statement sanctions the Federal Circuit held to be unconstitutional in this case. See Guidelines § 3C1.1 & Application Note 3(g) (enhancement applies to obstruction "during the *investigation*

5. The rule adopted by the Federal Circuit in these cases is unprecedented; we have been unable to find any case from any other court recognizing a constitutional right to make knowing and intentional false statements with impunity. The Federal Circuit generally has the final say on employee disciplinary matters. See 5 U.S.C. 7513(d) (employees may appeal adverse personnel actions to the MSPB); 5 U.S.C. 7703 (MSPB decisions on employee disciplinary matters appealable to Federal Circuit). Accordingly, the government is unlikely to have the opportunity to litigate the issues in this case before any other court of appeals. See generally *United States* v. *Fausto*, 484 U.S. 439, 446-447 (1988). Moreover, since the Federal Circuit derived its rule from the Constitution, it presumably cannot be altered through the issuance of regulations or even through amendment of the civil service statutes. Because the Federal Circuit's decisions in these cases conflict with decisions of this Court and impose unjustified constitutional restraints on the government's ability to manage the civil service system effectively, review by this Court is warranted.

---

* * * of the instant offense," including "providing a materially false statement to a law enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense") (emphasis added).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
SETH P. WAXMAN
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
DAVID M. COHEN
TODD M. HUGHES
Attorneys

LORRAINE LEWIS
General Counsel
STEVEN E. ABOW
JOSEPH E. MCCANN
ANA A. MAZZI
Attorneys
Office of General Counsel
Office of Personnel Management

MARCH 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Nos. 95-3745 and 95-3746

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

LESTER E. ERICKSON, JR., RESPONDENT

and

JEANETTE M. WALSH, RESPONDENT

and

MICHAEL G. BARRETT AND JEROME K. ROBERTS, RESPONDENTS

and

SHARON KYE, RESPONDENT

and

MERIT SYSTEMS PROTECTION BOARD, RESPONDENT

[Decided July 16, 1996]

Before: RICH, LOURIE, and RADER, *Circuit Judges.*

LOURIE, *Circuit Judge.*

The Director of the Office of Personnel Management ("OPM") petitions for review of (1) the final decision of the Merit Systems Protection Board holding that an agency may not charge an employee both with misconduct and with making false statements regarding the alleged misconduct, *Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586 (1994), and (2) the final decisions of the board reversing falsification charges based on its holding in *Walsh. Erickson v. Department of the Treasury*, 63 M.S.P.R. 80 (1994); *Kye v. Defense Logistics Agency*, 64 M.S.P.R. 570 (1994); *Barrett v. Department of the Interior*, 65 M.S.P.R. 186 (1994). We affirm.

BACKGROUND

A. *Walsh*

The Department of Veterans Affairs employed Jeanette M. Walsh as a Social Services Assistant at the agency's medical center in St. Cloud, Minnesota. The agency removed her for engaging in a sexual relationship with a patient, engaging in improper financial dealings with patients, and providing false statements to the agency regarding her alleged relationship with a patient. In particular, Walsh provided inconsistent statements regarding when her relationship with the patient began and how long it lasted. In a December 1988 meeting with her supervisor, Walsh acknowledged that she was having an intimate relationship with the patient, who at the time was no longer an in-patient. However, in a December 1991 affidavit, she averred that during the December 1988 meeting with her supervisor she accurately denied having an intimate relationship with the patient at that time. In spite of this inconsistency, she always stated that she did not have an

intimate relationship with the patient while he was an in-patient at the agency's facility from April 1988 until November 1, 1988.

In an initial decision, an administrative judge (AJ) found that the agency failed to prove the first two charges. Based on his findings regarding these charges, the AJ did not uphold the third charge. The agency petitioned for review by the full board. The board reversed the AJ's finding that the agency had failed to prove the first two charges, but held that the agency improperly charged Walsh with making false statements regarding the alleged misconduct. Relying on our decision in *Grubka v. Department of the Treasury*, 858 F.2d 1570, 1575 (Fed. Cir. 1988), the board held that an agency may not charge an employee both with misconduct and with making false statements regarding the alleged misconduct. The board recognized that certain of its prior decisions had held to the contrary. *Walsh*, 62 M.S.P.R. at 594 (citing *Greer v. United States Postal Serv.*, 43 M.S.P.R. 180, 184-85 (1990); *Kane v. Department of Veterans Affairs*, 46 M.S.P.R. 203, 209 (1990); *Sterling v. Department of Defense*, 46 M.S.P.R. 177, 185-86 (1990); *Hornbuckle v. Department of the Army*, 45 M.S.P.R. 50, 54 n.2 (1990); *Hill v. Department of the Army*, 44 M.S.P.R. 607, 611-12 (1990)). However, the board also determined that those decisions relied upon a faulty analysis of *Grubka*. In *Grubka*, we stated that a falsification charge based upon an employee's denial of misconduct "has no substance, is frivolous, and the decision of the AJ sustaining it is not supported by substantial evidence and is erroneous as a matter of law . . . ." *Grubka*, 858 F.2d at 1575. The board in *Walsh* reasoned that, because we used the conjunction "and" in our holding

in *Grubka*, two findings were made, one of which was that the charge was erroneous as a matter of law. According to the board, *Grubka* thus supports the proposition that a separate charge of making false statements regarding alleged misconduct is erroneous as a matter of law and is therefore improper.

The board also stated that in *Greer* and its progeny, it mischaracterized the due process concerns enunciated in *Grubka*. According to the board, these concerns were not, as stated in previous board decisions, based upon the Fifth Amendment right against compulsory self-incrimination but, rather, were based upon the due process right to be heard on a charge and to not have a falsification charge automatically sustained on the ground of sustaining the related misconduct. The board also determined that it erred in *Greer* when it stated that, as an alternative to providing false statements during an agency investigation, an employee may simply refuse to answer questions. According to the board, such a statement was contrary to precedential board decisions and Federal Circuit precedent; an employee may be removed solely for refusing to answer questions during an agency investigation if she is warned that she may be removed for not answering and that her statements cannot be used against her in a criminal prosecution. *See Weston v. United States Dep't of Hous. and Urban Dev.*, 724 F.2d 943, 949 (Fed. Cir. 1983); see also *Haine v. Department of the Navy*, 41 M.S.P.R. 462, 469 (1989). Accordingly, the board overruled *Greer* and its progeny to the extent that their holdings were contrary to *Grubka*.

The board mitigated Walsh's penalty to a 90-day suspension. In determining the appropriate penalty, the board noted that it previously had held that an

employee's false statements may be considered in determining a maximum reasonable penalty for misconduct. However, it stated that consideration of false statements in determining a penalty would conflict with the holding in *Grubka* and would in effect penalize an employee for denying a charge. Accordingly, the board held that an employee's alleged false statements in response to an agency inquiry may not properly be considered in determining a penalty.

B. *Erickson*

The Department of the Treasury employed Lester R. Erickson as a Supervisory Police Officer with the Bureau of Printing and Engraving. The agency removed Erickson for conduct unbecoming a supervisor and for making false statements in matters of official interest. The first charge was based on the agency's allegation that Erickson encouraged an employee of an agency contractor to make a "mad laugher" telephone call to another agency police officer during duty hours. The "mad laugher" calls were calls to employees at their duty stations during which the caller would laugh continuously and then hang up without identifying himself or herself.

The falsification charge was based on Erickson's denials that he participated in the "mad laugher" calls. In particular, when responding to a list of questions from an agency investigator, he made the following allegedly false statements:

> Question 2: "Approximate the number of occasions you made 'Mad Laugher' calls and to whom by name?"
> Answer: "None."

Question 6: "Approximate time you quit participating in 'Mad Laugher' calls."
Answer: "I never participated."

Question 9: "Specifically, how many times did you ask your subordinates to cease the 'Mad Laugher' calls?"
Answer: "None, [b]ecause I do not know who is doing it."

Question 12: "Are you willing to specifically state all those that are participants in the 'Mad Laugher' telephone calls."
Answer: "No—I do not know the true identification of the 'Mad Laugher.' In my opinion it is 95% of the police unit [and] also possibly personnel in Production."

In an initial decision, an AJ upheld both charges. The agency provided a sworn statement and subsequent affidavit by the person who was allegedly encouraged by Erickson to make one of the "mad laugher" calls. The statement and affidavit affirmed the truth of the charges, and the AJ found them to be credible. The AJ also found that the agency had told Erickson to refrain from making "mad laugher" calls and that encouraging another to engage in such a prank was disruptive to the agency's mission. Further, based on the AJ's belief in the credibility of the statements in the affidavit, as well as affidavits of others, the AJ found that Erickson had knowledge of and participated in the "mad laugher" calls and that he made false statements when he denied such involvement. The AJ also held that Erickson had not established that the agency's action was based on an

alleged handicapping condition of alcoholism. Accordingly, the AJ upheld the penalty of removal.

Erickson petitioned for review by the full board. The board determined that his petition did not meet the criteria for review under 5 C.F.R. § 1201.115; however, it reopened the case on its own motion under 5 C.F.R. § 1201.117. The board upheld the misconduct charge. However, based on its *Walsh* decision, the board reversed the falsification finding, stating that the essence of the charge was Erickson's failure to admit that he participated in "mad laugher" calls, and that he was charged with encouraging another to make such a call, not for his own alleged participation, and that was a matter not within the agency's concern. The board mitigated the penalty to a 15-day suspension, stating that under its *Walsh* holding it would not consider Erickson's allegedly false statements in determining an appropriate penalty for the misconduct.

C. *Kye*

The Defense Logistics Agency employed Sharon Kye as a Supervisory General Supply Specialist at the Defense Distribution Depot in Norfolk, Virginia. The agency removed her for several offenses related to alleged misuse of a Diners Club card that the agency issued to her for use in official travel. The agency also charged her with providing false information in an official investigation based on her contradictory statements regarding her use of the card during the time in question.

In an initial decision, an AJ sustained most of the charges relating to Kye's alleged misuse of the card. The AJ also sustained the falsification charge, finding that Kye provided false information regarding her

control over the card during the time in question. In particular, she initially replied to the charges by stating that the card was missing from the drawer where she kept it during the period of its alleged misuse and that she tore it up when it reappeared. During another interview, she stated that she tore up the card about three weeks earlier. Later, however, she stated that she meant to say that she "confronted the problem" about three weeks earlier but did not regain control of the card until about two weeks later. In addition, the agency claimed that she used the card at a motel during the time in question, and it produced a copy of a signed registration form from the motel. Kye stated in response that, although the signature on the registration form resembled her own, she did not recall being at the motel. The AJ found that Kye's statements contained many improbabilities and inconsistencies. For example, the AJ found that in order to believe Kye's statements that she may have used the card, he would have had to disbelieve her statements that she lost control of the card. The AJ also found that she had not met her burden of proof on her affirmative defenses of discrimination for making a protected disclosure and for a handicapping condition. Accordingly, the AJ found that Kye provided false statements to the agency, and he upheld the penalty of removal.

Kye petitioned for review by the full board. The board analyzed her affirmative defense of handicap discrimination and found that it lacked merit. Based on its decision in *Walsh*, the board summarily reversed the falsification charge and mitigated the penalty to a 45-day suspension.

D. *Barrett and Roberts*

The Department of the Interior, Bureau of Indian Affairs, employed Michael G. Barrett and Jerome K. Roberts as Soil Scientists at the Natural Resources and Engineering Laboratory in Gallup, New Mexico. The agency alleged that they left work during duty hours to help their supervisor build a fish pond at his home. The agency charged them with making a false claim on a time and attendance report based on their 1.5 hours of claimed duty time when they were allegedly building the fish pond; failing to report an act of fraud, waste, and abuse consisting of their supervisor's alleged misconduct; and misrepresentation or concealment of a material fact in connection with an agency investigation. According to the agency, they provided false information in response to the agency's inquiry. Roberts stated that he did not remember building a fish pond, and Barrett stated that he only worked on the fish pond on his own time. The agency demoted both and suspended them for 30 days. In an initial decision, an AJ sustained all charges and upheld the penalties. With respect to the falsification charge, the AJ found that Barrett and Roberts stated in response to agency questionnaires that they knew nothing of the events in question. Based on the testimony of others, the AJ found by a preponderance of the evidence that Barrett and Roberts were at their supervisor's house during the time in question and therefore that their statements to the contrary were false.

Barrett and Roberts petitioned for review by the full board, which vacated and remanded the AJ's initial decision. On remand, the AJ upheld the agency's action, and Barrett and Roberts again peti-

tioned for review by the full board. Based on its decision in *Walsh*, the board reversed the holdings of falsification and of failing to report an act of fraud, waste, and abuse. According to the board, requiring Barrett and Roberts to report their supervisor's alleged misconduct would have necessitated implicating themselves in the misconduct of filing a false time and attendance report, and such self-implication was contrary to its holding in *Walsh*. The false time and attendance report charges were sustained; they are not before us in this appeal. The board also mitigated the penalties to letters of reprimand.

DISCUSSION

We may reverse a decision of the board only if it was arbitrary, capricious, an abuse of discretion, or unlawful; procedurally deficient; or unsupported by substantial evidence. 5 U.S.C. § 7703(c) (1994); *Cheeseman v. Office of Personnel Management*, 791 F.2d 138, 140 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987).

Under the Fifth Amendment, "No person shall . . . be deprived of . . . property, without due process of law . . . ." U.S. CONST. amend. V. Procedural due process under the Fifth Amendment protects federal employees when they obtain a statutorily-created property interest in their employment. *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972) (stating that property interests are not created by the Constitution, but, rather, are created by existing rules or understandings). It is undisputed that the government employees here had a protected property interest in their employment. *See* 5 U.S.C. § 7513 (1994). Federal workers who meet the definition of "employee," 5 U.S.C. § 7511, are entitled to the following

procedures protecting their property interests in their continued employment:

An employee against whom an action is proposed is entitled to—

> (1) at least 30 days' advance written notice . . . stating the specific reasons for the proposed action;
>
> (2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
>
> (3) be represented by an attorney or other representative; and
>
> (4) a written decision and the specific reasons therefor at the earliest practicable date.

5 U.S.C. § 7513(b) (1994). Section 7513 also states that actions will be taken against an employee "only for such cause as will promote the efficiency of the service." *Id.* § 7513(a). When an agency brings charges against an employee, compliance with these procedures satisfies the minimum due process requirements to which the employee is entitled. The agency may then deprive the employee of his property interest in continued employment when he has been shown to have failed to perform his job properly or engaged in reprehensible conduct. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (stating that the essential requirements of due process are notice and a meaningful opportunity to respond). While it is clear that the procedures set out in the statute provide an employee with procedural due process, the question before us is whether doubling

up a misconduct charge with a charge of falsification in the course of the agency's investigation of the misconduct deprives the employee of the due process that the statute intends. We hold that it does.

OPM argues that the employees here were given all the procedural rights due them under 5 U.S.C. § 7513. OPM asserts, therefore, that it was not improper for the agencies to charge the employees with falsification based on their denials of facts related to the corresponding misconduct charges.

OPM argues that the statements in *Grubka* relied upon by the board are *dicta* and that therefore the board's holding in *Walsh* is not in accordance with law. The employees, on the other hand, argue that the relevant statements are not *dicta*; further, they argue that a reversal of *Walsh* would cause agencies to automatically charge employees with falsification when the employees deny charges of misconduct. The board, as respondent, argues that if we determine that the statements in *Grubka* are dicta we should remand for further consideration by the board.

In *Grubka*, we reversed a falsification charge that was based upon an employee's statements regarding his alleged misconduct. Grubka held a managerial position with the Internal Revenue Service, which charged him with conduct unbecoming an employee in a managerial position for allegedly embracing and kissing a female trainee at an off-duty hours Halloween party. *Grubka*, 858 F.2d at 1572-73. The agency also charged him with falsification, stating:

> *Reason II*: You made a false statement in a matter of official interest.
>
> *Specification 1*: On December 12, 1986, during an interview conducted by Mr. Curtis S. Jenkins and Ms. Eileen Collins, you denied kissing female Revenue Agent Harriet Novak on the mouth in a stairwell outside the room in which a party was being held at the Hilton Hotel, Buffalo, N.Y., on October 30, 1986. You then executed a written statement to that effect. This statement was false in that you did kiss Ms. Novak at the Hilton Hotel on that date.

Id. at 1574. The board sustained the falsification charge. We reversed the board's decision, stating:

> It has always been the rule and practice that a person charged with an offense can deny the charge and plead not guilty, either because he is not guilty or to force the charging party to prove the charge, and, regardless of the outcome, the denial is not itself a separate offense. Otherwise, a person could never defend himself against a charge, even though frivolous, for fear of committing another offense by denying the charge. The decision of the AJ denied Grubka his due process rights in that it denied him the right to a trial on the charge without due process of law.

Id. at 1575.

We do not agree that these statements are *dicta*. The word "*dicta*" is an abbreviation for *obiter dicta* (the singular being *obiter dictum* or, more commonly, *dictum*), which are "[w]ords of an opinion entirely unnecessary for the decision of the case." BLACK'S LAW DICTIONARY 1072 (6th ed. 1990). They include a "remark made, or opinion expressed, by a judge, in his decision upon a cause, 'by the way,' that is, incidentally or collaterally, and not directly upon the question before him, or upon a point not necessar-

ily involved in the determination of the cause, or introduced by way of illustration, or analogy or argument." *Id.*; *see Kastigar v. United States*, 406 U.S. 441, 454-55 (1972) (stating that broad language in an opinion unnecessary for the decision cannot be considered binding authority); *Smith v. Orr*, 855 F.2d 1544, 1550 (Fed. Cir. 1988) ("[I]t is well established that a general expression in an opinion, which expression is not essential to the disposition of the case, does not control a judgment in a subsequent proceeding.")

In dismissing the falsification charge in *Grubka*, this court's reasons as stated in its opinion for doing so were not *dicta* because they were essential to the decision in question. They were necessary to support the holding that "the [falsification] charge has no substance, is frivolous, and the decision of the AJ sustaining it is not supported by substantial evidence *and* is erroneous as a matter of law, and is set aside." *Grubka*, 858 F.2d at 1575 (emphasis added). One of the holdings was that the falsification charge was contrary to law; the above-quoted passage from *Grubka* was necessary to support that holding and it was therefore not *dictum*. *See Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) (stating that alternative holdings are not *dicta*); *see also Beverly v. United States Postal Serv.*, 907 F.2d 136, 137 (Fed. Cir. 1990) (stating that an AJ properly dismissed a falsification charge that was based on the petitioner's denial that she was at a football game, explaining that it was a mere denial of the misconduct charges and should not have been stated as a separate offense). Thus, *Grubka* is binding on us and on the Merit Systems Protection Board.

The facts of *Grubka* indicate that its holding was that an employee's denial of the factual basis of a charge may not be used as the basis for a falsification charge. Not only did Grubka deny the misconduct charge, conduct unbecoming an employee, he also denied kissing the trainee on the date in question, thereby denying the underlying facts related to the misconduct charge. *Grubka*, 858 F.2d at 1574. In particular, when interviewed by an agency representative, Grubka denied "kissing female Revenue Agent Harriet Novak on the mouth in a stairwell outside the room in which a party was being held at the Hilton Hotel, Buffalo, N.Y., on October 30, 1986." He also executed a written statement to that effect. Grubka thus specifically denied the facts underlying the misconduct charge. We explained in *Grubka* that, nevertheless, "the AJ held by circuitous reasoning that proof by Novak that Grubka kissed her *ipso facto* proved that his denial was false and therefore, his denial was a separate offense as charged." *Id.* We stated that this was improper because the "effect of it is to hold that a denial of a charge itself becomes a separate proven offense if what is denied is proven to be true." *Id.* at 1574-75.

OPM also argues that the relevant statements in *Grubka* should be considered *dicta* because, according to OPM, the due process issue was not fully briefed to the court in that case. OPM cites *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 572-73 (1993) (Souter, J., concurring). However, a rule announced without full briefing does not necessarily lack precedential weight. *See id.* at 573 (Souter, J., concurring). Moreover, the due process issue has been briefed in this case, along with the

issue concerning whether the relevant statements in *Grubka* are *dicta*.

OPM would have us draw a distinction between denying a charge and denying the underlying facts related to the charge. While agreeing that an employee obviously may deny a charge, OPM argues that an employee's denial of underlying facts should properly provide a basis for a falsification charge. We do not agree. A denial of underlying facts is in effect a denial of the charge that they support. Allowing an agency to charge an employee with falsely denying facts underlying a misconduct charge would deprive the employee of a *meaningful* opportunity to respond to the charges.

Drawing a law-fact distinction, as OPM would have us do, would require employees not trained in the law to distinguish between a legal statement of misconduct and the facts which define the misconduct. If this were permitted, employees might be reluctant to deny charges for fear that their denials would be construed as denials of facts, which in OPM's view would subject them to an additional falsification charge, providing a more severe penalty than a misconduct charge. In the cases before us, the falsification charges resulted in penalties of removal or demotion, whereas the misconduct charges alone, once the falsification charges were reversed at the board, resulted in penalties only of suspension or letters of reprimand. If agencies were allowed to inform employees under investigation for misconduct that their denial of facts may subject them to an additional falsification charge, they may be coerced into admitting the misconduct, whether they believe that they are guilty or not, in order to avoid the more severe penalty of removal possibly resulting from a

falsification charge. This dilemma might leave them without a meaningful opportunity to respond or provide a defense to the charges. It would create a "chilling effect" on their clear right to defend themselves, a "Catch-22" situation for employees that is inconsistent with the due process right provided by federal law to enable them to defend themselves.

Moreover, because memories are often faulty, responses to questions may not always be accurate. To render such statements constituting denials as actionable falsehoods might too readily transform credibility determinations into separate charges of falsification.

This does not mean, however, that an employee has a right to lie or affirmatively mislead an agency engaged in an investigation. *See Bryson v. United States*, 396 U.S. 64, 72 (1969) ("Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them."). Beyond a denial of a charge or of the factual accusations supporting a charge, an employee may not make up a false story, or tell "tall tales" in order to defend against a charge. Such falsehoods which go beyond denial and defense are actionable by an agency as falsification. For example, if an agency questions an employee regarding alleged misconduct that occurred in Washington, D.C., and the employee responds that he was in Boston at the time, when in fact he was not, that is a falsification that can constitute the basis for a charge independent of the charge of misconduct. For another example, if an agency questions an employee regarding a government-owned television set allegedly stolen from the workplace and found at his home, and the employee responds that he bought the set himself when in fact he did not, that similarly would

be a falsification separately chargeable. Moreover, when the agency is in an investigatory mode, prior to charges having been brought, the agency is entitled to truth-telling by its employees. Similarly, when investigations are conducted concerning the conduct of other employees, false statements are actionable. These examples hardly exhaust the situations in which an agency may charge an employee with making a false statement.

As further support for its position, OPM cites our decisions in *Gonzales v. Defense Logistics Agency*, 772 F.2d 887 (Fed. Cir. 1985) and *Ahles v. Department of Justice*, 768 F.2d 327 Fed. Cir. 1985). The employees in these cases were charged with both misconduct and altering documents to conceal their misconduct. OPM argues that the principle underlying these cases and *Grubka* and *Walsh* is the same, stating that "[i]f employees can be charged with misconduct and with falsifying documents to conceal their misconduct, as was done in *Gonzales* and *Ahles*, then it should be equally true that employees can be charged with misconduct and with making oral false statements to conceal their misconduct." Altering documents, however, goes beyond denial and consists of affirmative acts to mislead the agencies. These decisions thus do not support OPM's position.

OPM also argues that *Grubka* is contrary to an employee's obligation to cooperate and answer truthfully in agency investigations, citing 5 C.F.R. § 5.4. That regulation states in pertinent part:

> When required by the Office, the Merit Systems Protection Board, or the Special Counsel of the Merit Systems Protection Board, or by authorized representatives of these bodies, agencies shall make available to them, or to their authorized representatives, employees to testify in regard to matters inquired of under the civil service laws, rules, and regulations, and records pertinent to these matters. All such employees, and all applicants or eligibles for positions covered by these rules, shall give to the Office, the Merit Systems Protection Board, the Special Counsel, or to their authorized representatives, all information, testimony, documents, and material in regard to the above matters, the disclosure of which is not otherwise prohibited by law or regulation.

5 C.F.R. § 5.4 (1995). We do not agree. OPM's position, if accepted, would have the effect of requiring employees to assist in proving the charges brought against them.

The burden is on an agency to prove charges against an employee. *See* 5 U.S.C. § 7701(c) (1994); *Jackson v. Veterans Admin.*, 768 F.2d 1325, 1329 (Fed. Cir. 1985) (stating that an agency has the burden of proof and the burden of persuasion in establishing the factual basis for misconduct). An agency has means to prove charges other than through admissions or denials of an employee under investigation. While it might be easier for an agency to prove a charge by using the leverage of an added charge of falsification to compel admissions, due process requires that an employee be allowed to deny both a charge and the underlying facts without being subject to a falsification charge. Accordingly, while an employee has no right to lie or make a false statement to an agency, an employee's mere denials of charges and

their underlying facts may not be used by an agency as a basis for a falsification or similar charge.

OPM argues that the Fifth Amendment right against compulsory self-incrimination does not require a right of denial. As discussed above, however, the board did not err in determining that the holding in *Grubka* was based on procedural due process concerns. The Fifth Amendment right against compulsory self-incrimination is not dispositive of the issue here.

Finally, OPM argues that the board erred in interpreting *Grubka* to prohibit consideration of an employee's alleged false statements in a penalty determination. In *Walsh*, the board declined to consider Walsh's denial of the charges and related facts as justification for an enhanced penalty. In support of its position, OPM cites *United States v. Dunnigan*, 507 U.S. 87 (1993). The defendant in *Dunnigan* was convicted of conspiracy to distribute cocaine. Her sentence was enhanced because the trial court found that she committed perjury. She appealed to the Fourth Circuit, which affirmed the conviction but vacated her sentence, holding that the relevant sentencing guideline was unconstitutional, and reasoning that otherwise "every defendant who takes the stand and is convicted [would] be given the obstruction of justice enhancement." *United States v. Dunnigan*, 944 F.2d 178, 183 (4th Cir. 1991), *rev'd*, 507 U.S. 87 (1993). On review by the Supreme Court, Dunnigan argued that enhancing her sentence because of perjury interfered with her right to testify. The Court disagreed, stating that a defendant's right to testify does not include a right to commit perjury. *Dunnigan*, 507 U.S. at 96. Likewise, beyond their right to deny charges brought

against them and to deny facts supporting the charges, federal employees have no right to lie or make false statements to the government, and such false statements made during agency investigations and relating to alleged misconduct may properly be subject to separate falsification charges, which provide their own penalty if the requisite elements of the charge are proven.

However, *Dunnigan* does not provide an agency with the right to make dual charges of misconduct and falsification. That case only dealt with enhancement of a sentence in a criminal context, where there is a heavier burden of proof than agencies have in proving charges of falsification against employees. Moreover, the crime of perjury consists of lying under oath, a much more serious offense than violation of 5 C.F.R. § 5.4, thereby justifying a penalty beyond that levied on the basic offense. Thus, *Dunnigan* is not controlling here. In any event, if a falsification charge may not be added to a misconduct charge on the basis of mere denials, one can hardly justify enhancing a misconduct penalty because of such asserted falsification.

In sum, we hold, consistently with *Grubka*, that an agency may not charge an employee with falsification or a similar charge on the ground of the employee's denial of another charge or of underlying facts relating to that other charge. However, employees do not otherwise have a right to lie or make false factual statements to an agency, and such false statements made during agency investigations and relating to alleged misconduct may properly be subject to falsification or similar charges. Denials of charges and related facts may not be considered in determining a penalty.

In light of our holding here and the clarification of our holding in *Grubka*, we will now review whether the board's decisions in not sustaining the particular falsification charges before us were arbitrary, capricious, an abuse of discretion, or unlawful; procedurally deficient; or unsupported by substantial evidence. *See* 5 U.S.C. § 7703(c) (1994). In *Walsh*, the alleged inconsistent statements related to Walsh's initial acknowledgement of having an intimate relationship with the patient when he was not an in-patient, and her subsequent denial of that fact. However, she consistently denied having an intimate relationship with the patient while he was an in-patient at the agency's facility. Her admission of having an intimate relationship with the patient was not a false statement, as the board found that she did have an intimate relationship with him from time to time while he was not an in-patient. Her other statements are mere denials of having an intimate relationship with the patient. Therefore, the board did not err in refusing to sustain the falsification charge against Walsh.

In *Erickson*, it was his denials of having knowledge of or participating in the "mad laugher" calls that formed the basis for the falsification charges. He was charged with conduct unbecoming a supervisor for encouraging another to make one of the "mad laugher" calls, and his statements, as they related to the alleged misconduct, were denials of having engaged in such conduct; they were thus not otherwise false. Therefore, the board did not err in reversing the falsification charge against Erickson.

In *Kye*, it was Kye's statements regarding whether or not she had control of her Diners Club card during the time in question that formed the basis of the

falsification charge against her. While she may have provided ambiguous statements regarding her control of the card, she consistently denied using the card during the time in question. She also testified that she suspected her son used the card during the time in question. This statement is consistent with her statement that she may have lost control of the card and it is also consistent with her denial of using the card. Further, she did not affirmatively state that someone else used the card; rather, she stated her belief that her son may have used it. Her statements in effect were thus denials and were not actionable false statements. Therefore, the board did not err in dismissing the falsification charge against Kye.

In *Barrett*, it was Barrett's and Roberts' denial of alleged misconduct that formed the basis for the falsification charges. In answering an investigator's questionnaire, both indicated that they knew nothing of the events in question. That was in essence a denial and was not otherwise false. Therefore, the board did not err in reversing the falsification charges against Barrett and Roberts. Falsifying time cards is another matter, but it is not before us.

CONCLUSION

The board's decisions in *Walsh*, *Erickson*, *Kye*, and *Barrett* are affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 96-3028

JAMES B. KING, DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

HARRY R. MCMANUS, RESPONDENT
AND
MERIT SYSTEMS PROTECTION BOARD, RESPONDENT

Decided: July 22, 1996

Before: RICH, LOURIE, and RADER, *Circuit Judges.*

LOURIE, *Circuit Judge.*

DECISION

The Director of the Office of Personnel Management ("OPM") petitions for review of the board's final decision in *McManus v. Department of Justice*, 66 M.S.P.R. 564 (1995), reversing a falsification charge based upon its holding in *Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586 (1994). We affirm.

DISCUSSION

The Department of Justice ("the agency") employed Harry R. McManus as a Lieutenant. The agency de-

moted him to the position of Correctional Officer, charging him with (1) conduct unbecoming a supervisor based upon sexual comments that he made to one of his subordinates, Corrections Officer Judith White, and (2) making false statements during an official investigation. In an initial decision, an administrative judge ("AJ") found that when McManus was interviewed during the agency's investigation he admitted making sexual comments to White. Even though the comments were often made in an atmosphere in which workers voluntarily participated, the AJ found this to be unsuitable conduct for a supervisor and he therefore sustained the misconduct charge.

The AJ found that McManus made the following false statements during the agency's investigation:

> (1) during the interview on October 29, 1993 (interview 1), the appellant responded that he never told Officer White that he was disappointed that she did not call during the evening they were on duty together; during the interview on November 19, 1993 (interview 2), he responded that he had called Officer White and told her that he was disappointed that she had not called;
>
> (2) during interview 1, the appellant stated that he never said he would have Officer White relieved so that she could come over to FCI and tease him more; during interview 2, however, the appellant stated that maybe he had stated he would have Officer White relieved;
>
> (3) during interview 1, the appellant stated that he never asked Officer White why she had not traded posts with Officer Smith so that she

(Officer White) could be closer to him at FCI; during interview 2, he stated that, indeed, he may have asked her this;

(4) during interview 1, the appellant flatly denied discussing the subject of preferred sexual positions with Officer White; during interview 2, the appellant responded that he asked the appellant [sic], "What (positions) do you like?";

(5) during interview 1, the appellant flatly denied ever discussing Officer White accompanying him on a WITSEC trip; however, during interview 2, the appellant stated that he had asked her to accompany him; and

(6) during interview 1, the appellant denied that he told Officer White that he had a bulge (in his pants) while talking with her; during interview 2, the appellant responded, "Can you see how much you excite me?" (referring to the bulge in his pants).

When questioned about these inconsistent statements during his oral reply to the agency's notice, McManus stated that he may have "skirted the issue" in an attempt to end the investigation and that his responses during the second interview were simply elaborations of his first responses. The AJ found that McManus's explanation was not credible and that he intentionally made false statements to the agency during its investigation. Therefore, the AJ sustained the falsification charge.

However, the AJ found that the agency's penalty of demotion exceeded the tolerable bounds of reasonableness. The AJ found that McManus's comments were

mostly delivered in jest among willing participants, including White, who initiated the comments on more than one occasion. With respect to the falsification charge, the AJ considered that McManus ultimately told the truth regarding the misconduct. The AJ also considered that McManus had eleven years of service without any prior discipline. Accordingly, the AJ mitigated the penalty to a fourteen-day suspension.

The agency petitioned the full board for review. The board denied the petition as failing to meet the criteria for review under 5 C.F.R. § 1201.115; however, it reopened the appeal on its own motion under 5 C.F.R. § 1201.117. Based upon its decision in *Walsh*, in which it held that an agency may not charge an employee both with misconduct and with making false statements regarding the alleged misconduct, the board reversed the falsification charge against McManus. The board sustained the misconduct charge and found that the AJ did not err in mitigating the penalty. Accordingly, the board affirmed the initial decision as modified and sustained the mitigation of the penalty to a fourteen-day suspension. OPM now appeals.

OPM argues that the board's holding in *Walsh* is not in accordance with law. According to OPM, the board in its *Walsh* decision relied upon dicta in *Grubka v. Department of the Treasury*, 858 F.2d 1570, 1575 (Fed. Cir. 1988). We recently addressed the same issue in *King v. Erickson*, Nos. 95-3745, 95-3746 (Fed. Cir. July 16, 1996). In *Erickson*, we stated that the statements in question in *Grubka* were not *dicta*, and we held that "an agency may not charge an employee with falsification or a similar charge on the ground of the employee's denial of another charge or

of underlying facts relating to that other charge." *Erickson*, slip op. at 22.

We review whether the board's decision in reversing the falsification charge against McManus was arbitrary, capricious, an abuse of discretion, or unlawful; procedurally deficient; or unsupported by substantial evidence. *See* 5 U.S.C. § 7703(c) (1994). Each of McManus's responses alleged to be false statements was essentially a denial of the misconduct under investigation. During the agency's first interview, he stated that he never said the statements in question or he denied having said them. During the second interview, he stated substantially the opposite. Under our holding in *Erickson*, we must conclude that the first responses were within the range of denials that must be permitted in order to make meaningful the right to respond to charges; they were therefore not separately-actionable false statements. Accordingly, the board did not err in reversing the falsification charge against McManus. OPM has not appealed the issue of mitigation of the penalty, and we therefore do not address it.

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

No. CH-0752-92-0021-I-1

JEANETTE M. WALSH, APPELLANT

v.

DEPARTMENT OF VETERANS AFFAIRS, AGENCY

[MAY 31, 1994]

OPINION AND ORDER

Before: BEN L. ERDREICH, Chairman, JESSICA L. PARKS, Vice Chairman, and ANTONIO C. AMADOR, Member.

Chairman ERDREICH issues a concurring opinion.

The agency petitions for review of the initial decision reversing the appellant's removal from her position as a GS-6 social services assistant at the agency's St. Cloud, Minnesota Medical Center. For the reasons set forth below, we GRANT the petition for review, REVERSE the initial decision in part, AFFIRM the initial decision in part, and mitigate the penalty to a 90-day suspension.

BACKGROUND

The agency based its removal action on three charges: (1) Engaging in an intimate sexual relationship with an alcohol-dependent patient, Richard Brown; (2) engaging in improper financial dealings with Brown and another patient; and (3) providing false statements to the agency concerning her relationship with Brown. Agency File, Tab 4h; see also Initial Appeal File (IAF), Tab 11.

After allowing the parties to submit written evidence,[1] the administrative judge found that the first and second charges could not be upheld. He found that the agency failed to prove that the appellant had engaged in an intimate sexual relationship with Mr. Brown while he was undergoing treatment at the medical center, that certain products one patient apparently purchased were purchased from the appellant rather than from her sister, or that the other person with whom the appellant allegedly had financial dealings was a patient at the time of the alleged dealings. The administrative judge declined to uphold the third charge largely on the basis of his findings concerning the first and second charges. He therefore ordered the agency to cancel the appellant's removal.

In its petition for review,[2] the agency argues that the administrative judge erred in finding that it failed to establish that the appellant was involved in an

[1] The appellant did not request a hearing, and thus the administrative judge rendered his decision based on the written record.

[2] The agency has provided evidence of compliance with the administrative judge's interim relief order sufficient to meet the requirements of 5 C.F.R. § 1201.115(b).

intimate sexual relationship with Mr. Brown while he was an in-patient and an out-patient at the medical center. It points to several alleged inconsistencies in the appellant's statements regarding her relationship with Mr. Brown, and asserts that the administrative judge erred in finding the appellant's statements concerning the relationship to be more specific and consistent than Mr. Brown's statements that he and the appellant had an intimate relationship while he was a patient at the St. Cloud facility. The agency argues that the administrative judge further erred in finding that it had failed to establish that the appellant provided false or misleading information when she denied having an intimate relationship with Mr. Brown while he was a patient and in finding that it had failed to establish that she concealed a fact in connection with the agency's inquiry into the matter by persuading Mr. Brown to conceal his relationship with her.[3]

ANALYSIS

Contrary to the administrative judge's finding, the agency did prove that the appellant had an intimate sexual relationship with Mr. Brown while he was an in-patient at the medical center.

The agency's assertion that the appellant has provided inconsistent explanations of the length of her relationship with Mr. Brown is correct. In an affidavit dated December 30, 1991, the appellant stated that she had sexual relations with Mr. Brown three or four times in the summer of 1989. Appeal File, Tab

[3] The agency has not challenged the administrative judge's findings regarding any of the other specifications on which the removal was based.

9. In her statement to agency investigators, however, she asserted that she had an intimate relationship with Mr. Brown for approximately a year and half, beginning in November of 1988. Agency File, Tab 4k at 5. The appellant also acknowledged in that statement that, when she met with her supervisor in December of 1988—when Mr. Brown was no longer an in-patient—she was having a relationship with him. *Id.* at 9-10. In her December 30, 1991 affidavit, however, she stated that, during the December 1988 meeting with her supervisor, she correctly denied having an intimate relationship with Mr. Brown at the time of the meeting. Appeal File, Tab 9. Thus, the appellant's statements regarding when her relationship with Mr. Brown started and how long it lasted are inconsistent. Despite these inconsistencies, however, the appellant has consistently stated that she did not have an intimate relationship with Mr. Brown while he was an in-patient at the medical center from April of 1988 until November 1, 1988.

The agency argues, in effect, that the inconsistencies in the appellant's statement discredit that statement, and that, once the statement of a witness has been discredited on one issue or charge, an administrative judge may not accept the statement of the same witness on other charges unless he provides some reasoned explanation of that acceptance. *See* Petition for Review at 4. The latter part of this argument is supported by the Board decision on which the agency relies, *Sternberg v. Department of Defense*, 41 M.S.P.R. 46, 54 (1989). That case also states, however, that an administrative judge is not required to discredit all of the statement of a witness when some of the statement is discredited, but if some of the statement is to be found credible, the administrative

judge must provide a reasoned explanation. *Id.* In this case, the administrative judge did not address the inconsistencies in the appellant's various explanations, and he did not discuss why some of the appellant's statements are credible while others are not. This failure warrants Board review since, as discussed below, the appellant's statements are in contrast with Mr. Brown's statements. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980) (in reviewing an initial decision, the Board is free to substitute its own determinations of fact for those of the administrative judge, giving his findings only as much weight as may be warranted by the record and by the strength of his reasoning), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam).

The agency's investigation into the appellant's relationship with Mr. Brown was initiated as a result of a letter to the agency from Mr. Brown's wife, Donna.[4] In that letter, Mrs. Brown complained that the staff at the medical center had determined that her husband should be admitted to the agency's Kennic Falls, Wisconsin, facility, and not the St. Cloud facility, because of his previous relationship with the appellant. Mrs. Brown had no direct evidence regarding her husband's relationship with the appellant, however; her subsequent statement to agency investigators was based entirely on Mr. Brown's statements to her about the relationship. *See* Agency File, Tab 4s. Although hearsay evidence is admissible in Board proceedings, the probative value of Mrs. Brown's statement is slight because of

---

[4] Richard and Donna Brown were not married at the time of the appellant's relationship with Mr. Brown; they did not meet until April of 1990. Agency File, Tab 4k at 11.

her lack of direct knowledge and the fact that Mr. Brown—the source of her knowledge—also provided a statement. *Borninkhof v. Department of Justice*, 5 M.S.P.R. 77, 83-87 (1981) (assessment of the probative value of hearsay evidence necessarily depends on the circumstances of each case). Further, Mrs. Brown's statement that her husband was sent to the Kennic Falls, Wisconsin, facility because of his prior relationship with the appellant is not supported by the statements of Mr. Brown's treating therapists, counselors, and social workers. They stated that Mr. Brown was admitted to the Kennic Falls facility based on their assessment of his clinical needs, an assessment that was unrelated to the appellant's presence at the St. Cloud facility. Agency File, Tabs 41 at 1-2 (statement of James Broda), 4n at 3 (statement of John Pucel), 4m at 1 (statement of Siri Krawchuk), 4o at 1-2 (statement of Irene Oberman), and 4t at 1 (statement of Ronald Williams).

To support its allegation that the appellant was involved in an intimate sexual relationship, the agency relied extensively on Mr. Brown's statement to the investigators. He maintained in his statement that he became involved with the appellant in September of 1988, that the relationship lasted six or seven months, and that they had sexual relations almost every weekend from mid-September 1988 until his discharge from the medical center in November of 1988. *See* Agency File, Tab 4j at 1 and 6. He also maintained that he lied to the appellant's supervisor in December of 1988, in order to protect the appellant, when he told the supervisor that he knew the appellant in North Dakota in the early 1980s and refused to disclose to the supervisor the existence of the relationship. *Id.* at 2 and 7-8.

Mr. Brown's statement is bolstered by the joint statement of his Alcoholics Anonymous sponsors, Dale and Linda Willet. The Willets corroborate Mr. Brown's statement that the appellant and Mr. Brown were friends and that Brown at least occasionally would spend weekends at the appellant's home in the autumn of 1988, but they both admitted that they did not know whether Mr. Brown and the appellant engaged in sexual relations while he was an in-patient. *See* Agency File, Tab 4r at 3-4.

Contrary to the administrative judge's finding that Mr. Brown's statements were "general and inconsistent," Initial Decision at 9, we find Mr. Brown's statement about his relationship with the appellant to be consistent and detailed. Mr. Brown provided significant details about his relationship with the appellant and specifically described the interior of her home. *See* Agency File, Tab 4j. While his statement is inconsistent with an earlier statement to the appellant's supervisor, Mr. Brown explained that he refused to disclose the relationship in an effort to protect the appellant. *Id.* at 7-8. Although the Willets' limited knowledge is of little probative value, it does lend some support to Mr. Brown's assertion that he was involved in a relationship with the appellant.[5]

---

[5] The administrative judge discredited the Willets' statement because they asserted that they reported the alleged intimate relationship to agency employees in 1989 or 1990, but the record shows that the report was made in December of 1988. Initial Decision at 8-9. The administrative judge also discredited the Willets' statement because of the implausibility of the statement that Mr. Brown told Mr. Willet that the appellant purchased alcohol for him. *Id.* According to the administrative judge, neither Mr. Willet nor the agency presented any

Thus, in contrast to the appellant's self-serving denials of an intimate relationship with Mr. Brown while he was an in-patient at the medical center, Mr. Brown's statements have been detailed regarding the existence of such a relationship. We can conceive of no reason for Mr. Brown to fabricate the existence of such a relationship and the appellant has provided none. If Mr. Brown desired to please his current wife, who was very upset about his being sent to the Kennic Valley facility for treatment,[6] it is likely that he would have attempted to minimize the length of his relationship with the appellant. Thus, we sustain the charge of having an intimate relationship with an in-patient of the medical center.

Also contrary to the administrative judge's finding, the agency did prove that the appellant engaged in sexual relations with Mr. Brown while he was an out-patient at the medical center.

The agency also argues that the appellant admitted having sexual relations with Mr. Brown while he was an out-patient from November 15, 1988, to March 2,

---

evidence that the alcohol purchase was ever reported, even though such a purchase "would have had a far more direct bearing on Mr. Brown's sobriety than his asserted intimate relationship with the appellant." *Id.* at 9. The agency asserts that the administrative judge erred in discrediting the Willets' statement because of the discrepancies in dates, and we agree. The fact that the Willets erred in recalling the date of a situation that existed several years earlier is not grounds to discredit their entire statement. Additionally, the fact that the Willets did not report Mr. Brown's statement that the appellant purchased alcohol for him is not grounds to discredit their statement. Nevertheless, because of their limited knowledge, their statement is of little probative value.

[6] *See* Agency File, Tabs 4m at 4-5 (statement of Siri Krawchuk).

1990. In a December 20, 1991 affidavit, Ronald Williams stated that Mr. Brown missed several out-patient appointments at the medical center between November 15, 1988, and March 2, 1990. *See* Appeal File, Tab 6, Affidavit of Ronald Williams at 1 and accompanying list. Thus, we find that Mr. Brown was an out-patient at the agency medical center after his early November of 1988 discharge from its domiciliary unit. Since the appellant admitted, as mentioned above, that she had sexual relations with Mr. Brown on and off between November of 1988 until April of 1990, see Agency File, Tab 4k at 2, we also sustain the charge that the appellant had an intimate relationship with Mr. Brown while he was an out-patient.

The agency failed to prove the specification of the falsification charge that the appellant persuaded Mr. Brown to conceal the existence of their relationship.

The administrative judge properly found that the agency failed to prove that the appellant persuaded Mr. Brown in December 1989 to conceal from the appellant's supervisor the existence of their relationship. To support this specification, the agency relied on Mr. Brown's statement to the agency investigators that the appellant told him that, if her supervisor found out about the relationship, she would be in a lot of trouble and would probably lose her job. *See* Agency File, Tab 4j at 2. Mr. Brown also stated that he had refused to say that he was involved in a relationship with the appellant because he wanted to protect her and because he thought the agency would "take my sex away." Agency File, Tab 4j at 8. Thus, according to Mr. Brown's statement, while the appellant told him of possible consequences if her supervisor found out about the relationship, the appellant never asked him to conceal their relation-

ship; instead, his statement indicates that he decided on his own to lie. Thus, the administrative judge properly did not sustain this aspect of the falsification charge.

The agency improperly charged the appellant with providing false statements concerning her relationship with Brown.

As discussed above, the agency charged the appellant with providing false statements concerning her relationship with Mr. Brown. Specifically, on review, the agency points to the inconsistent statements that the appellant has provided to it and asserts that these statements demonstrate that the appellant falsified.

In *Grubka v. Department of the Treasury*, 858 F.2d 1570, 1574 (Fed. Cir. 1988), the court addressed the situation where an agency charges an employee with misconduct and separately charges him or her with making a false statement in response to an agency inquiry about the misconduct. The court in *Grubka* found circuitous and without merit the administrative judge's reasoning in that appeal that, by proving the underlying misconduct, the agency ipso facto proved that Grubka's denial of the misconduct was false and therefore proved the separate offense of making a false statement. *Id.* The court in *Grubka* stated as follows:

> It has always been the rule and practice that a person charged with an offense can deny the charge and plead not guilty, either because he is not guilty or to force the charging party to prove the charge, and regardless of the outcome, the denial is not itself a separate offense. Otherwise, a person could never defend himself against a charge, even though frivolous, for fear of committing another offense by denying the charge. The decision of the [administrative judge] denied Grubka his due process rights in that it denied him the right to a trial on the charge without due process of law.

Id. at 1575.[7]

We recognize that the Board has previously held that an agency may separately charge an employee with misconduct and making false statements regarding the alleged misconduct, when the falsification concerns a matter of official interest to the agency. *See Greer v. U.S. Postal Service*, 43 M.S.P.R. 180, 184-85 (1990); *see also, e.g., Kane v. Department of Veterans Affairs*, 46 M.S.P.R. 203, 209 (1990); *Sterling v. Department of Defense*, 46 M.S.P.R. 177, 185-86 (1990); *Hornbuckle v. Department of the Army*, 45 M.S.P.R. 50, 54 n. 2 (1990); *Hill v. Department of the Army*, 44 M.S.P.R. 607, 611-12 (1990). Upon further consideration, however, we find that such decisions are based on a faulty analysis of the Federal Circuit's decision in *Grubka*.

The agency specifically charged *Grubka* with making a false statement in a matter of official interest. *Grubka*, 858 F.2d at 1574. The Federal Circuit stated, however, that such a charge "has no substance, is frivolous, and . . . it is not supported by substantial evidence and is erroneous as a matter of law. . . ." *Id.* By using the conjunctive "and" the court made two separate findings: that the charge was

---

[7] The Federal Circuit reaffirmed its holding in *Grubka* in *Beverly v. U.S. Postal Service*, 907 F.2d 136, 137 (Fed. Cir. 1990), in finding that the administrative judge correctly held that a charge of making a false statement in denial of another charge should not have been stated as a separate offense.

erroneous as a matter of law, and that the charge was not supported by substantial evidence. *Id.* Thus, the court opined that a separate charge of making a false statement regarding other alleged misconduct was erroneous as a matter of law. *Id.*

The court also found that the agency's charge must fail because the appellant's alleged false statement "was not a denial of a matter of official interest to the IRS, because it had nothing to do with the work of the agency." *Id.* at 1575. This holding pertained to the agency's failure to prove every element of its charge, namely, that Grubka made a false statement and that the false statement dealt with a matter of official interest to the agency. *Id.* Contrary to our previous holdings, we find that this statement was not intended to carve out an exception to the court's holding that the denial of another charge can never itself be a separate offense; rather, it pertained to the evidence presented in support of that charge.

In *Greer* and its progeny, the Board also mischaracterized the Federal Circuit's due process concerns by stating that the court was concerned with the appellant's Fifth Amendment right to remain silent. On further consideration, we find that the court was actually more concerned about an appellant's due process right to have an opportunity to be heard on a charge, and not to have a falsification type charge automatically sustained by virtue of the sustaining of an underlying charge. *See Grubka*, 858 F.2d at 1575.

In addition, the Board's decision in *Greer* was erroneous for stating that, as an alternative to falsifying during an agency investigation, an employee may refuse to answer questions. *Greer*, 43 M.S.P.R. at 186. That statement ignored the fact that, under Board and Federal Circuit precedent, an employee

may be removed solely for remaining silent in response to an inquiry if the employee is adequately informed that he or she is subject to discharge for not answering questions and that any replies and their fruits cannot be employed in a criminal case. *See Weston v. Department of Housing & Urban Development*, 724 F.2d 943, 949 (Fed. Cir. 1983); *Haine v. Department of the Navy*, 41 M.S.P.R. 462, 469 (1989).

Thus, to the extent that *Greer*, and cases that rely on its holding, hold that an agency may separately charge an employee with misconduct and making false statements or a similar offense regarding the alleged misconduct, we overrule them. We find that the charge of making false statements was improper and that the administrative judge erred in considering it.

A 90-day suspension is the maximum reasonable penalty for the sustained misconduct.

When the Board does not sustain all of the agency's charges and specifications, we must carefully consider whether the sustained misconduct merits the penalty imposed by the agency. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 308 (1981). In this case, we have found that, while employed as a social services assistant, the appellant engaged in sexual relations with an alcohol-dependent patient at the agency medical center. The sustained charge is serious since, as stated by the chief of the domiciliary unit, patients are very vulnerable and dependent and can be easily manipulated by the staff. Appeal File, Tab 6 (statement of Ronald Williams) at 2. As further stated by the chief of the domiciliary unit, personal relationships can tempt dependency and hamper a patient's efforts at sobriety. *Id.* Thus, we find that the appellant's relationship with Mr. Brown went to the core of her duties as a social services assistant in

the domiciliary unit. Moreover, the misconduct was intentional and continued for some 18 months.

Although the Board has previously held that an appellant's false statements may be considered in determining the maximum reasonable penalty, we are not considering the appellant's apparently false statements here. If we are to give meaning to the Federal Circuit's statement that a person charged with an offense may deny the charge and force the charging party to prove the charge, we must hold that the denial of misconduct cannot result in harm to the accused. Otherwise, we are still saying that the accused may only deny a charge at his or her own peril. Accordingly, to the extent that previous Board decisions have held that an appellant's false statements in response to an agency inquiry may be considered in determining the penalty, we overrule them.

Despite the seriousness of the appellant's misconduct, she has over 17 years of service with the agency, at least the last year of which was rated at the highly successful level. In addition, the record contains no indication of any prior disciplinary actions against her. Thus, we find that a 90-day suspension is sufficient to impress upon the appellant the seriousness of her misconduct, and that it constitutes the maximum reasonable penalty for the sustained misconduct.

ORDER

Accordingly, we ORDER the agency to cancel the appellant's removal and to replace it with a 90-day suspension effective September 26, 1991. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the

Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: /s/ ROBERT E. TAYLOR
ROBERT E. TAYLOR
Clerk of the Board

Washington, D.C.

CONCURRING OPINION OF CHAIRMAN BEN L. ERDREICH

Jeanette M. Walsh v. Department of Veterans Affairs
CH-0752-92-0021-I-1

I concur in the majority opinion in this appeal because it is consistent with the binding precedent of the U.S. Court of Appeals for the Federal Circuit. Nevertheless, I write separately to express my concerns about how the Federal Circuit's holdings that control the Board's decision in this case[8] comport with federal statutory and regulatory requirements.

In *Grubka* and *Beverly* the Federal Circuit established and affirmed the principle that a federal employee may not be disciplined for both an act of misconduct and the false denial of that act of misconduct. In other words, an employee may give an untrue denial statement in response to an agency investigation into his alleged misconduct without the possibility of discipline for that statement (so long as the underlying misconduct being investigated ultimately is used to support a formal disciplinary charge against the employee). In application, this principle seems to conflict with several mandates that require a federal employee to be truthful in dealings with his federal employer.

For example, 18 U.S.C. § 1001 requires individuals to be truthful in any statements given in a matter within the jurisdiction of a federal agency, or suffer the penalty of a fine of up to $10,000 and imprisonment

---

[8] *Grubka v. Department of the Treasury*, 858 F.2d 1570 (Fed. Cir. 1988) and *Beverly v. United States Postal Service*, 907 F.2d 136 (Fed. Cir. 1990).

of up to five years. Title 5 of the Code of Federal Regulations, section 5.4 (Civil Service Rule V) requires employees to give testimony under oath when required to by the Office of Personnel Management, the Merit Systems Protection Board, or the Office of Special Counsel. Agency inspectors general investigating alleged fraud, federal security specialists investigating alleged security breaches, and EEO investigators investigating alleged discrimination all conduct inquiries on behalf of agencies and all routinely rely on the truthfulness of the statements made by federal employees.

Under 18 U.S.C. § 1001 even individuals who are being questioned about possible criminal wrongdoing do not have the right to provide false information, yet *Grubka* and *Beverly* hold that an employee being questioned about possible non-criminal misconduct is allowed to provide false information with impunity. Although the former individual may exercise his Fifth Amendment right to remain silent, the latter does not enjoy that right and may not decline to answer questions from his employer.[9]

Thus *Grubka* and *Beverly* have the anomalous result that an employee may be required to respond to an agency inquiry, but may not be required to respond truthfully. They also give federal employees a privilege not accorded to ordinary citizens who "may decline to answer the question, or answer it honestly,

[9] *See Weston v. Department of Housing & Urban Development*, 724 F.2d 943, 948-49 (Fed. Cir. 1983) (a federal employee may be removed solely for remaining silent in response to an agency inquiry if the employee is adequately informed that he or she is subject to discharge for not answering questions and that any replies and their fruits cannot be used in a criminal case).

but [who] cannot with impunity knowingly and willfully answer with a falsehood." *Bryson v. United States*, 396 U.S. 64, 72 (1969).

Title 18 U.S.C. § 1001 criminalizes the making of a false, fictitious, or fraudulent statement to a federal department or agency by an employee regarding his or her employment. Its application under *Grubka* and *Beverly* apparently means that an employee could be fined and imprisoned for making false, fictitious, or fraudulent statements, but the employing agency could not consider those statements in connection with an adverse action based in part on any misconduct at issue in the false, fictitious, or fraudulent statements.

I am aware that a majority of federal circuit courts of appeals has adopted the principle that the subject of a criminal investigation may falsely deny a charge of misconduct without violating 18 U.S.C. § 1001.[10] However, I do not find that doctrine analogous to this situation because (1) the administrative proceedings in this case do not involve the Fifth Amendment right to remain silent found in criminal proceedings, (2) the statements made in *Grubka* and *Beverly* are more than the simple denials of misconduct, and (3) the false statements made by Ms. Walsh were made for the purpose of retaining her federal position. This

[10] The "exculpatory no" doctrine is discussed in *United States v. Taylor*, 907 F.2d 801, 803-06 (8th Cir. 1990); *United States v. Cogdell*, 844 F.2d 179, 182-84 (4th Cir. 1988); *United States v. Medina De Perez*, 799 F.2d 540, 542-47 (9th Cir. 1986); *United States v. Tabor*, 788 F.2d 714, 716-19 (11th Cir. 1986); *United States v. Fitzgibbon*, 619 F.2d 874, 876-81 (10th Cir. 1980); *United States v. Chevoor*, 526 F.2d 178, 181-84 (1st Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

last condition has been specifically referenced as a situation not protected by the doctrine.[11]

In *Grubka* the Court held that Mr. Grubka could not be disciplined for either the false denial of the charged misconduct or for giving a written statement supporting that denial. In *Beverly* the Court held that Ms. Beverly could not be disciplined for either the false denial of the charged misconduct or for providing false notarized statements from other individuals supporting her untruthful denial. This is clear direction to the Board that we also should reverse disciplinary charges that are based on the denial of misconduct or on statements made in support of that denial.

Regardless of federal statutory and regulatory mandates requiring employee honesty in dealings in matters within the jurisdiction of a federal agency, under *Grubka* and *Beverly* the Board is compelled not to sustain any charges related to enforcing this standard of truthfulness if the employee is denying misconduct that is the basis for a separate formal disciplinary charge against that employee.

In this case Ms. Walsh was charged with making seven false statements.[12] One of those statements was found by the Board not to be false. Of the remaining six statements, five are specific denials of acts that would constitute engaging in an intimate relationship with a patient, and the sixth is a falsehood

---

[11] *Paternostro v. United States*, 311 F.2d 298, 305 (5th Cir. 1962), overruled by *United States v. Rodriguez-Rios*, 14 F.3d 1040 (5th Cir. 1994) (en banc); *Marzani v. United States*, 168 F.2d 133, 141-42 (D.C. Cir.), *aff'd on appeal by an equally divided Supreme Court*, 335 U.S. 895 (1948).

[12] Agency File, tab 4h.

about a fact related to her relationship with that patient. Since a separate charge that is the basis for this removal is engaging in an intimate relationship with a patient, the entire charge of making false statements in an agency investigation must be set aside as inconsistent with the rule in *Grubka* and *Beverly*. This is true even though there are other statutory or regulatory admonitions requiring truthfulness of federal employees.

I have concerns about how this decision following *Grubka* and *Beverly* affects the standards of employee conduct basic to the ethical underpinnings of our federal civil service. Accordingly, I concur with the majority opinion but with the reservations discussed above.

/s/ BEN L. ERDREICH
BEN L. ERDREICH
Chairman

[Decision Sheet Omitted]

APPENDIX D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

No. DA-0752-93-0295-I-1

LESTER E. ERICKSON, APPELLANT

v.

DEPARTMENT OF THE TREASURY, AGENCY
MERIT SYSTEMS PROTECTION BOARD

[Filed: June 1, 1994]

Before: ERDREICH, Chairman, PARKS, Vice Chairman, and AMADOR, Member.

OPINION AND ORDER

The appellant petitions for review of the July 21, 1993 initial decision that upheld his removal. We find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, AFFIRM the initial decision IN PART, REVERSE the initial decision IN PART, and MITIGATE the removal to a 15-day suspension.

BACKGROUND

The agency removed the appellant from his Police Sergeant position for: (1) "Making False Statements in Matters of Official Interest"; and (2) "Conduct Unbecoming a Supervisor." Initial Appeal File (IAF), Tab 8, Subtabs 4a, 4b, 41. The appellant filed a timely petition for appeal in which he alleged that, in removing him, the agency discriminated against him on the basis of a handicapping condition and violated his constitutional rights. IAF, Tab 2. The administrative judge, deciding the appeal on the basis of the parties' written submissions, sustained both charges, rejected the appellant's claims of handicap discrimination and violation of his constitutional rights, and affirmed the removal. IAF, Tab 26.

The appellant reiterates his handicap discrimination claim and his constitutional claims in his timely petition for review. Petition for Review (PRF), Tab 1. The agency opposes the petition for review. PRF, Tab 3.

ANALYSIS

The petition for review establishes no error; the initial decision is affirmed in part.

The appellant does not identify in his petition for review any legal error on the administrative judge's part with respect to the charges or his handicap discrimination claim, nor does he identify any relevant evidence that the administrative judge overlooked or misinterpreted. We therefore deny the petition for review. 5 C.F.R. § 1201.115(c). Having reopened this appeal, and discerning no error in the initial decision's sustaining charge (2) and rejecting the appel-

lant's handicap discrimination claim, we affirm those findings.

Charge (1) cannot be sustained.

The agency specified in support of charge (1) that the appellant "had knowledge of, and participated in," a series of anonymous harassing telephone calls received by agency employees. The caller was referred to as the "Mad Laugher" because he or she would laugh wildly into the telephone and then hang up. The agency further specified that the appellant gave a sworn statement to an agency investigator in which he denied knowing who had made the calls. It therefore charged him with "Making False Statements in Matters of Official Interest" in violation of the agency's Minimum Standards of Conduct. IAF, Tab 8, Subtab 41; *see* IAF, Tab 8, Subtab 4cc at 2.

Charge (1) appears to be based on the appellant's responses to question numbers 2, 6, 9, and 12 on the list of questions that an agency investigator posed to him on October 30, 1992. Question number 2 states, "Approximate the number of occasions you made 'Mad Laugher' calls and to whom by name?" The appellant responded, "None." Question number 6 states, "Approximate time you quit participating in "Mad Laugher" calls." The appellant responded, "I never participated." Question number 9 states, "Specifically, how many times did you ask your subordinates to cease the 'Mad Laugher' calls?" The appellant responded, "None, [b]ecause I do not know who is doing it." Question number 12 states in pertinent part, "Are you willing to specifically state all those that are participants in the 'Mad Laugher' telephone calls." The appellant responded, "No—I do not know the true identification of the 'Mad Laugher.' In my

opinion it is 95% of the police unit [and] also possibly personnel in Production." *See* IAF, Tab 8, Subtab 4x at 5, 7, 9. Charge (2), "Conduct Unbecoming a Supervisor," was based on the appellant's having encouraged an employee of an agency contractor to make a "Mad Laugher" call to another agency police officer during duty hours. IAF, Tab 8, Subtab 41.

An agency may not charge an employee with falsely denying misconduct when it is separately charging the employee with the underlying misconduct. *Grubka v. Department of the Treasury*, 858 F.2d 1570, 1574-75 (Fed. Cir. 1988); *Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586, 595 (1994). Thus, charge (1) cannot be sustained, for its essence is the appellant's failure to admit that he was involved in the misconduct under investigation.

We note that the agency, in its submission to the administrative judge, alleged that several police officers witnessed the appellant making "Mad Laugher" calls to agency employees during duty hours. IAF, Tab 25 at 6. The agency did not charge the appellant with making such calls, however. Charge (1) is based entirely on the veracity of statements that the appellant made to an agency official who was investigating the calls. Although charge (1) does make reference to the appellant's "participat[ion] in" the "Mad Laugher" calls, it is captioned "Making False Statements in Matters of Official Interest," it cites a provision of the agency's Minimum Standards of Conduct that relates solely to making false statements, and the specification in support of the charge relates only to the appellant's answers to the agency investigator's questions. IAF, Tab 8, Subtabs 41, 4cc at 2. Charge (2) is based entirely on the appellant's having encouraged an employee of an agency contrac-

tor to make a call. IAF, Tab 8, Subtab 41. Neither charge, therefore, was sufficient to put the appellant on notice that he was being charged with making "Mad Laugher" calls.

The Board will not sustain an adverse action on the basis of charges that could have been brought, but were not. *Nazelrod v. Department of Justice*, 54 M.S.P.R. 461, 466 (1992). Accordingly, we disregard the agency's allegation that the appellant made "Mad Laugher" calls.

We therefore reverse the initial decision insofar as it sustained charge (1).

The penalty of removal is mitigated to a 15-day suspension.

Where, as here, not all of the charges upon which an agency based an adverse action are sustained, the Board must carefully consider whether the sustained charges merit the penalty imposed. *See Montalvo v. U.S. Postal Service*, 55 M.S.P.R. 128, 132-33 (1992).

Again, charge (2) is based on the appellant's having encouraged an employee of an agency contractor to make a "Mad Laugher" call to another agency police officer during duty hours. IAF, Tab 8, Subtab 41. This misconduct reflected poor judgment on the appellant's part. On the other hand, it was not "disruptive," as averred by the deciding official, IAF, Tab 23 at 2, for as stated in the notice of proposed removal, the contractor's employee did not make the call, IAF, Tab 8, Subtab 41.

Further, although the appellant, as a supervisor, is held to a higher standard of conduct than a non-supervisory employee, *Jackson v. U.S. Postal Service*, 48 M.S.P.R. 472, 476 (1991), it does not appear from the affidavit of the contractor's employee that the appellant encouraged her to make the telephone call openly and in front of his subordinates, IAF, Tab 8, Subtab 4y. Thus, his misconduct was not such that it destroyed his ability to effectively supervise.

Additionally, although the deciding official considered the appellant's having denied his involvement in the "Mad Laugher" calls to have been "blatant dishonesty," IAF, Tab 23 at 2, we do not consider it as an aggravating factor, *see Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586, 595-596 (1994) (an employee's false denial of misconduct is not an aggravating factor in assessing the penalty for the misconduct).

The appellant performed satisfactory service in his Police Sergeant position for approximately two years and four months. IAF, Tab 8, Subtabs 4a, 4bb. There is no evidence to indicate that he has a record of discipline for misconduct, and in any event, the agency did not cite elements of his record in the notice of proposed removal. IAF, Tab 8, Subtab 41; *see Underwood v. Department of Defense*, 53 M.S.P.R. 355, 360 (an employee's past disciplinary record cannot be considered in determining the appropriate penalty for misconduct if it was not cited in the notice of adverse action), *aff'd*, 980 F.2d 744 (Fed. Cir. 1992) (Table). For the single instance of encouraging an employee of an agency contractor to make a "Mad Laugher" call that the employee did not make, we conclude that the maximum reasonable penalty, under the circumstances, is a 15-day suspension.

ORDER

We ORDER the agency to cancel the appellant's removal and to replace it with a 15-day suspension, retroactive to March 20, 1993. *See Kerr v. National*

Endowment for the Arts, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201. 113(c).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representa-

tion by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: /s/ ROBERT E. TAYLOR
ROBERT E. TAYLOR
Clerk of the Board

Washington, D.C.

[Decision Sheet Omitted]

APPENDIX E

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

No. PH-0752-93-0524-I-1

SHARON KYE, APPELLANT

v.

DEFENSE LOGISTICS AGENCY, AGENCY
MERIT SYSTEMS PROTECTION BOARD

[Filed: Oct. 4, 1994]

Before: EDREICH, Chairman, PARKS, Vice Chairman, and AMADOR, Member.

OPINION AND ORDER

The appellant petitions for review of the November 12, 1993 initial decision that sustained her removal. For the reasons discussed below, we GRANT the petition, REVERSE the initial decision in part, AFFIRM the initial decision in part, and MITIGATE the penalty to a 45-day suspension.

BACKGROUND

The agency removed the appellant from the GS-12 position of Supervisory General Supply Specialist based on the following six charges: failure to safeguard her government Diners Club Card and personal identification number (PIN) (first offense); failure to

follow specific instructions for reporting loss, theft, or compromise of her government Diners Club Card and/or PIN; failure to fully participate in an official investigation (first offense); misuse of her government Diners Club card (first offense); providing false information in an official investigation (first offense); and failure to properly notify the agency of an unscheduled absence (first offense).

The administrative judge found that the agency did not prove two of the charges, i.e., failure to fully participate in an official investigation and failure to properly notify the agency of an unscheduled absence. Also, he found that the appellant did not prove her affirmative defenses of handicap discrimination based on alcoholism and reprisal for filing an equal employment opportunity complaint. The administrative judge sustained the agency's removal action based on the appellant's sustained misconduct which included her response to the agency's inquiry into that matter. Initial Appeal File (IAF), Tab 18 (Initial Decision at 21).

In her petition for review, the appellant alleges that the administrative judge erred in finding that she had not demonstrated that she was an alcoholic, in failing to address her allegation that the agency discriminated against her on the basis of the handicapping condition of mood disorder and depression, and in not considering the cumulative effect of these claimed medical conditions in his adjudication of her handicap discrimination claim.

ANALYSIS

The administrative judge erred by limiting his analysis of the appellant's handicap discrimination claim to the condition of alcoholism, but this error

was not prejudicial; the Board finds no merit to the claim.

The appellant raised a claim of handicap discrimination on the additional basis of depression below by submission of a letter from her physician diagnosing her depression, and by counsel at the hearing. IAF, Tab 17; Hearing Transcript at 6. Although the administrative judge alluded to the evidence concerning the appellant's condition of depression, ID at 16-18, he did not analyze that matter in connection with the appellant's handicap discrimination claim. This adjudicatory error did not prejudice the appellant's substantive rights, however, because the appellant has failed to demonstrate that her claimed medical conditions, either alone or in tandem, caused her sustained misconduct. *See Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984).

Specifically, we find that the appellant has failed to make out a prima facie case of handicap discrimination. The necessary elements of a prima facie case of handicap discrimination will vary according to the particular facts and circumstances at issue. *See Dazey v. Department of the Air Force*, 54 M.S.P.R. 658, 661 (1992). Generally, the elements of a prima facie case of handicap discrimination based on a mental illness such as depression include: a showing that the person is a qualified handicapped person and that the action appealed was based on his handicap; and, to the extent possible, an articulation of a reasonable accommodation under which the employee believes he could perform the essential duties of his position. *Id.* To make out a prima facie case of handicap discrimination based on the condition of alcoholism, an appellant must prove that he is a qualified handicapped person and that his handicap caused his

misconduct or that the misconduct was entirely a manifestation of his handicap. *See Davis v. Department of the Army*, 57 M.S.P.R. 203, 208-09 (1993).

Here, we note that the physician who diagnosed the appellant's mood disorder and depression, Patrick Thrasher, M.D., first saw her July 23, 1993, almost three months after the occurrence of the charged misconduct. IAF, Tab 18 (ID at 16). Therefore, this evidence provides scant support for a finding that the appellant's misconduct was caused by that condition.

Further, the administrative judge's finding that the appellant had not shown a causal relationship between her claimed alcoholism and the sustained misconduct, IAF, Tab 18 (ID at 19), similarly leads to a finding of a lack of causation between the sustained misconduct and the appellant's depression or a combination of those two claimed medical conditions. That is, the administrative judge, assuming *arguendo* that the appellant had established that she suffered from the handicapping condition of alcoholism, nevertheless correctly found that:

> The agency did not specifically claim that the appellant used her card to withdraw cash; but rather, that she failed to safeguard her card and PIN, failed to report its loss . . ., and, on one occasion, used the card for the rental of a motel room. The appellant has not claimed that she does not recall not missing the card, [or] not knowing of her responsibilities with the card. . . .

Id. Therefore, inasmuch as the appellant did not establish causation, we find that she failed to make out a prima facie case of handicap discrimination with regard to the medical conditions of alcoholism or

depression, or a combination of the two. *See Dazey*, 54 M.S.P.R. at 661.

The agency improperly charged the appellant with providing false information in an official investigation.

In *Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586 (1994), the Board, interpreting *Grubka v. Department of the Treasury*, 858 F.2d 1570 (Fed. Cir.1988), recently held that an agency may not, as a matter of law, separately charge an employee with making a false statement in defending a charge of alleged misconduct. Here, the agency charged the appellant with misconduct in connection with her government Diners Club Card. Under Walsh, the agency's additional charge of providing false information in an official investigation regarding the alleged misconduct cannot be sustained.

A 45-day suspension is the maximum reasonable penalty for the sustained misconduct.

When not all of the charges are sustained, the Board will consider carefully whether the sustained charges warrant the penalty imposed by the agency. *Douglas v. Veterans Administration*, 5 MSPB 313, 5 M.S.P.R. 280, 308 (1981). In this case, three of the six charges against the appellant, including the charges that the agency considered the most serious, IAF, Tab 3, Subtab 1, have not been sustained. The sustained charges, i.e., (1) failing to safeguard a government Diners Club Card and PIN; (2) failure to follow specific instructions for reporting loss, theft, or compromise of a government Diners Club Card and/or PIN; and (3) one instance of misuse of a government Diners Club Card, are serious. They must, however,

be balanced against the appellant's unblemished record, which the agency considered excellent, IAF, Tab 18 (ID at 21), and the fact that, of her own volition, the appellant has taken full responsibility for repaying the improper charges to her government credit card. The Board finds therefore that a 45-day suspension is the maximum reasonable penalty for the sustained charges. *See Nelson v. Veterans Administration*, 22 M.S.P.R. 65 (1984); *Johnson v. Department of the Treasury*, 15 M.S.P.R. 731 (1983), *aff'd*, 770 F.2d 181 (Fed. Cir. 1985) (Table).

ORDER

We ORDER the agency to cancel the appellant's removal and to substitute a 45-day suspension. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed.Cir.1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the

agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

AMADOR, Member, issues a dissenting opinion.

For the Board:

ROBERT E. TAYLOR,

WASHINGTON, DC.

DISSENTING OPINION OF MEMBER AMADOR.

I dissent.

In determining whether an agency selected penalty is to be upheld, the Board has long followed the principles set forth in *Douglas v. Veterans Administration*, 5 MSPB 313, 5 M.S.P.R. 280 (1981). The majority opinion exhibits a flawed understanding of this decision and distorts the factual record to support its conclusion that mitigation is warranted.

The first and most important of the twelve *Douglas* factors is:

> The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated. *Id.*, 5 M.S.P.R. at 305

There is no question that, under this factor, the appellant's offenses were extremely serious. The appellant repeatedly and intentionally misused her government credit card for her (or her son's) personal gain. A total of over $2000 in cash withdrawals were made on 29 different occasions using the appellant's government credit card.

The second *Douglas* factor is the employee's job level and type of employment, including whether the

employee was a supervisor. The appellant occupied a supervisory position at a fairly high position within the agency (Branch Director, GS-12). The Board has traditionally held supervisory employees to higher standards of conduct. *See, e.g., Walcott v. U.S. Postal Service*, 52 M.S.P.R. 277, *aff'd*, 980 F.2d 744 (Fed. Cir. 1992) (Table).

In addition, the appellant knew her actions were wrong, and she was clearly on notice of the rules that were violated by her misconduct. *See Perrodin v. Department of Justice*, 55 M.S.P.R. 407, 413 (1992). Moreover, when the problem with her credit card was first brought to her attention by the agency, she assured the agency that the problem had been corrected, but additional credit charges were made after this time. Thus, the administrative judge correctly found the appellant had forfeited the agency's trust.

Finally, the appellant is not a good candidate for rehabilitation because she has not shown remorse for her misconduct. *See Dolezal v. Department of the Army*, 58 M.S.P.R. 64, 71 (1993), *aff'd*, 22 F.3d 1104 (Fed. Cir. 1994). To the contrary, in order to explain away her misconduct and to avoid its consequences, the appellant presented the obviously manufactured, and uncorroborated, claim that she was suffering from depression, drinking heavily, and taking drugs during this one 30 day period in her life. The administrative judge clearly and persuasively analyzed this claim. He observed that the appellant's testimony concerning the alleged effects of her drinking was at great variance with that of her supervisors, who testified that they had had daily contact with the appellant and that they had never noticed any of the classic signs of a substance abuse problem, i.e., no

attendance problems, no appearance of impairment, no odor of alcohol on her breath, no poor performance, no incoherency in thought or expression, and no mood swings or changes from her normal behavior. Based on this evidence, the administrative judge correctly found that there was no showing that the appellant's alleged personal problems had led to or caused her misconduct.

The majority's opinion does not provide any substantial reasoning or logic for its decision to mitigate the penalty. The majority's refusal to properly apply *Douglas* represents a blatant violation of the principle that the Board will not substitute its judgment for that of the agency.

The penalty of removal should be affirmed.

APPENDIX F

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Nos. DE0752900226-B-2, DE0752900227-B-2
and DE0752900228-B-2

MERIT SYSTEMS PROTECTION BOARD

MICHAEL G. BARRETT, JEROME K. ROBERTS,
AND THOMAS J. WIGGINS, APPELLANTS

v.

DEPARTMENT OF THE INTERIOR, AGENCY

[Filed: Nov. 9, 1994]

Before: ERDREICH, Chairman, PARKS, Vice Chairman, and AMADOR, Member.

OPINION AND ORDER

The appellants have timely petitioned for review of the September 3, 1993 remand initial decision that sustained the agency's actions against them. For the reasons set forth below, we GRANT the petition for review under 5 C.F.R. § 1201.115, and AFFIRM the initial decision as MODIFIED, still SUSTAINING the adverse action with regard to Wiggins, but MITIGATING the penalty with regard to Barrett and Roberts to a letter of reprimand.

BACKGROUND

The agency's actions against the appellants were based on allegations that: (1) On the afternoon of June 9, 1988, Barrett, Roberts, and another agency employee left duty in a government pickup truck to help build a fish pond in Wiggins' backyard and took agency equipment with them; (2) neither Barrett nor Roberts took leave for the time they were not on duty and both men subsequently denied knowledge of the event; (3) Wiggins did not charge his subordinates, Barrett and Roberts, and two other agency employees, Ray Ben and Dean Slim, with leave for the time they worked on the fish pond;[1] and (4) Wiggins falsified his own time and attendance report for the following Monday, June 13, 1988, by incorrectly indicating that he was at work. MSPB Docket No. DE07529010226, Initial Appeal File (IAF 1), Tab 3, Subtab 4h; MSPB Docket No. DE07529010227, Initial Appeal File (IAF 2), Tab 3, Subtab 4h; MSPB Docket No. DE07529010228, Initial Appeal File (IAF 3), Tab 3, Subtab 4j. As a result of this misconduct, the agency suspended Barrett and Roberts for 30 days and reduced both of them in grade based on the charges of: (1) Misrepresentation or concealment of a material fact in connection with an investigation; (2) failure to report an act of fraud, waste, and abuse; and (3) making a false claim on a time and attendance report. IAF 1, Tab 3, Subtabs 4a-4c, 4h; IAF 2, Tab 3, Subtabs 4a-4c, 4h. The agency reduced Barrett in grade from a GS-11 soil scientist to a GS-9 soil scientist, IAF 1,

---

[1] At the time that the agency took the adverse actions against the appellants, neither Ben nor Slim were still employed by the agency. Thus, they were not charged with misconduct.

Tab 3, Subtab 4b, and reduced Roberts in grade from a GS-9 soil scientist to a GS-7 physical science technician, IAF 2, Tab 3, Subtab 4b. The agency removed Wiggins from his GS-12 supervisory physical scientist position based on the charges of: (1) Misuse of a government vehicle; (2) misuse of government equipment; (3) misuse of government employees; (4) falsification of government time and attendance reports; and (5) making a false claim on a time and attendance report. IAF 3, Tab 3, Subtabs 4a, 4b, 4j.

The appellants denied any misconduct and maintained that, although Wiggins was at his home during the afternoon of June 9, 1988, he was on annual leave, and that Roberts and Barrett were at work during the period in question. The appellants claimed that Wiggins was assisted by three friends and two day laborers, none of whom were agency employees.

To support the charges, the agency primarily relied on four witnesses: Ray Ben, Dean Slim, Stanley Etsitty, and Ronald Martin. Ben and Slim were agency employees at the time of the alleged misconduct and testified that they went to Wiggins' home, along with Barrett and Roberts, and helped build the fish pond. Hearing Transcript (HT) at 37-40, testimony of Ben; HT at 51-52, testimony of Slim. Etsitty, also a former agency employee, testified that he saw Roberts, Barrett, and Ben leave the agency facility in the government pickup truck. HT at 7-8. Martin, the driver of the cement truck that brought the cement for the fish pond, testified that he saw Roberts and Ben at Wiggins' home. He also testified that he saw a pickup truck with a United States Government license plate parked in front of Wiggins' home. HT at 69-71.

The appellants petitioned the Board for appeal of the agency's actions.[2] After affording the appellants the hearing that they requested, the administrative judge upheld all of the charges, except for the charge that Wiggins falsified his own time and attendance report for June 13, 1988, and sustained the actions. IAF 1, Tab 20; IAF 2, Tab 20; IAF 3, Tab 20. The appellants then petitioned for review of that initial decision.

In an Opinion and Order, the Board granted the appellants' petition for review, vacated the initial decision, remanded the appeal for additional fact findings, and directed the administrative judge to issue a new initial decision. *Barrett v. Department of the Interior*, 54 M.S.P.R. 356 (1992). In a remand initial decision, the administrative judge again upheld all of the charges, except for the false time and attendance report charge against Wiggins, and sustained the actions. MSPB Docket No. DE0752900226B1, Remand Initial Appeal File, Tab 12.

The appellants petitioned for review of that initial decision and the Board issued an Opinion and Order that granted the petition for review, vacated the initial decision, remanded the appeal for additional fact findings, and directed the administrative judge to issue a new initial decision. *Barrett v. Department of the Interior*, 57 M.S.P.R. 635 (1993). The administrative judge issued the instant initial decision in which he complied with the Board's remand instructions and

---

[2] Because the issues raised in the appeals of all three appellants are very similar and are interrelated, the appeals were consolidated by the administrative judge during the original adjudication of the appeals. IAF 1, Tab 4; IAF 2, Tab 4; IAF 3, Tab 4; *see* 5 C.F.R. § 1201.36(a)(1). The agency requested that the appeals be consolidated, and none of the appellants objected.

again upheld all of the charges, except for the false time and attendance report charge against Wiggins, and sustained the actions. MSPB Docket No. DE0752900226-B-2, Remand Initial Appeal File, Tab 2, Remand Initial Decision (RID). The appellants have petitioned for review of the remand initial decision.

On review, the appellants argue that the administrative judge erred in his fact findings and credibility determinations in the remand initial decision. MSPB Docket No. DE0752900226-B-2, Petition for Review File (PFRF), Tab 1, Petition for Review (PFR). The agency has timely responded in opposition to the petition for review. PFRF, Tab 3.

ANALYSIS

The Board will not consider the appellants' reply to the agency's response to the petition for review.

The agency's response to the petition for review is styled as a "Cross Petition for Review," but it raises no allegations of error by the administrative judge in the remand initial decision and thus only constitutes a response to the petition for review. *Id.* In a notice acknowledging the agency's submission, the Clerk of the Board afforded the appellants 25 days to respond. PFRF, Tab 4. Because the agency's submission raises no allegations of error by the administrative judge, it should not have been treated as a cross petition for review and the appellants should not have been afforded the opportunity to respond to it. Thus, the record on review closed 25 days after the date of service of the petition for review. 5 C.F.R. § 1201.114(d), (i); PFRF, Tab 2. A party may not file additional evidence or argument after the close of the record on review unless the party shows that the

evidence was not readily available before the record closed. 5 C.F.R. § 1201.114(i).

We have not considered the appellants' reply to the agency's submission titled a "cross petition for review" which, as explained above, only constituted a response to the petition for review. *See* PFRF, Tab 5. Although an appellant has a right to reply to an agency's cross petition for review, there is no right to reply to an agency's response to a petition for review. *See* 5 C.F.R. § 1201.114(d), (i). Even though the appellants were inadvertently informed that they could file a reply to the agency's misnamed filing, the appellants are not disadvantaged by now having that reply disallowed because they had no right to file such a document.

The administrative judge made a number of errors in his fact findings and credibility determinations, but those errors do not constitute reversible error.

The Board will generally defer to an administrative judge's fact findings and credibility determinations and will not grant a petition for review based on a party's mere disagreement with those fact findings and credibility determinations. *Weaver v. Department of the Navy*, 2 MSPB 297, 2 M.S.P.R. 129, 133-34 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam). The Board is free, however, to substitute its own determinations of fact for those of an administrative judge, giving his findings only as much weight as may be warranted by the record and by the strength of his reasoning. *Id.* at 133. In making credibility determinations, the Board will consider a number of factors, including: (1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character;

(3) any prior inconsistent statement by the witness; (4) the witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; and (6) the inherent improbability of the witness's version of events. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

It is undisputed that Wiggins constructed a fish pond at his residence in June 1988 and that Eagle Readimix Concrete provided the concrete for the project during the afternoon of June 9, 1988. It is also undisputed that Wiggins was at his residence on annual leave at the time of the concrete pour. The dispositive issue in this appeal is whether appellants Barrett and Roberts and agency employees Ben and Slim were also present at Wiggins' residence at the time of the concrete pour and whether they used government equipment and a government pickup truck in the project.

The administrative judge mischaracterized the testimony of Kathleen Meech.

In his remand initial decision, the administrative judge found that the agency's chain of evidence began with the testimony of Kathleen Meech, co-owner of Eagle Readimix Concrete, that Roberts placed the order for the concrete. RID at 12; HT at 64. The administrative judge stated that, although Meech's testimony did not place Roberts at the concrete pour on June 9, 1988, it did directly contradict his written statement that he had no knowledge of the fish pond project. RID at 12; *see* IAF 2, Tab 3, Subtab 4p. On review, the appellants argue that the administrative judge mischaracterized Meech's testimony. PFR at 12. We agree. When asked on cross examination

whether she was sure if Roberts was the man who placed the concrete order, Meech responded that "[w]e'll, I'm going to have to say that I'm just—I'm guessing." HT at 66.

Thus, contrary to the administrative judge's finding, Meech did not identify Roberts as the individual who placed the concrete order, but rather "guessed" that he was the individual. In addition, at the hearing, the administrative judge interrupted the cross examination of Meech about her identification of Roberts and stated that who placed the order for concrete was not material. HT at 66-67. The administrative judge's error regarding Meech's testimony is not a basis to reverse the remand initial decision because he did not depend on Meech's identification of Roberts as the sole basis to support additional findings elsewhere in the remand initial decision. *See* RID at 14.

The administrative judge correctly characterized Martin's testimony and the testimony of another cement truck driver, and correctly found Martin credible.

The appellants also argue that the administrative judge mischaracterized the testimony of Martin and a second cement truck driver, Hector Estrada. PFR at 13-14. According to the appellants, the administrative judge failed to mention that Martin's testimony did not place Barrett and Slim at the concrete pour and that Estrada could only identify Wiggins as being at the concrete pour. *Id.*; *see* HT at 69-70, testimony of Martin, HT at 79-80, testimony of Estrada. The appellants also assert that the administrative judge erroneously stated that they offered no candidate for possible misidentification by Martin when in fact they suggested that Martin confused K.C. Liggins, a

friend of Wiggins who allegedly assisted in the project, for Roberts. PFR at 13-14.

We believe that the administrative judge correctly characterized Martin's testimony and that the administrative judge's failure to mention every aspect, limitation, or inconsistency in Martin's and Estrada's testimony does not mean that he did not fully consider the testimony. *Marques v. Department of Health & Human Services*, 22 M.S.P.R. 129, 132 (1984), aff'd, 776 F.2d 1062 (Fed. Cir. 1985) (Table), *cert. denied*, 476 U.S. 1141, 106 S.Ct. 2247, 90 L.Ed.2d 693 (1986). The administrative judge did, however, misstate that the appellants offered no candidates for possible misidentification by Martin. RID at 12. As correctly argued by the appellants on review, they contended below that Martin confused Liggins for Roberts. The record reflects, however, that Martin testified that Roberts was present at Wiggins' home on June 9, 1988, and that he remembered the concrete delivery because of an incident with Wiggins' check and his driver's license. HT at 72-73. In addition, we find Martin's testimony about the white license plate on a pickup truck parked in front of Wiggins' home particularly compelling. HT at 71. The administrative judge correctly noted that New Mexico license plates are yellow with red letters and that U.S. Government license plates are white. RID at 4.

As also found by the administrative judge, there is no reason for Martin to fabricate his testimony and his testimony was straightforward and convincing. *See* RID at 8; *see also Hillen*, 35 M.S.P.R. at 458. Thus, we find his testimony credible.

The administrative judge considered the testimony of Etsitty, Slim, and Ben and correctly concluded that their testimony was credible.

The appellants also argue on review that the administrative judge failed to consider bias against the appellants by Etsitty, Slim, and Ben. PFR at 15-17. The administrative judge considered the allegations of bias and concluded that the appellants failed to show that Etsitty, Slim, and Ben had a motive to give false testimony. RID at 13. As found by the administrative judge, as former employees of the agency, the three witnesses were potentially adversely affecting their future employment opportunities with the agency by their admissions of participation in the fish pond project during duty hours. *Id.* We agree with this assessment, at least with regard to Ben and Slim, who testified that they participated in the fish pond project. HT at 37-39, testimony of Ben; HT at 50-51, testimony of Slim. Ben's and Slim's testimony is compelling because it was contrary to their interests to admit involvement in misconduct and thus they would have little motivation to fabricate. *See Hillen*, 35 M.S.P.R. at 458. With regard to Etsitty, we acknowledge that he grieved a performance rating from Wiggins and that he apparently had at least one work-related disagreement with Barrett, but as found by the administrative judge, the appellants failed to show that he was biased against them. RID at 13.

The appellants also assert that the administrative judge failed to consider Ben's inconsistent statements. PFR at 23-24. According to the appellants, Ben originally denied any knowledge of the construction of a fish pond, but later, when he allegedly

sought reemployment by the agency, he remembered the events in question. *Id.* The administrative judge considered the possibility that Ben, Slim, and Etsitty fabricated their testimony in an effort to gain reemployment by the agency but, as discussed above, he found that not to be the case. RID at 13. We believe that it is more likely that Ben initially denied knowledge of the fish pond project in order to protect himself and subsequently decided to reveal the truth.

The appellants also argue that the administrative judge failed to address a number of inconsistencies in the testimony of key agency witnesses and failed to address inconsistencies in the statements, deposition, and hearing testimony of the individual witnesses. PFR at 17-21. For example, Etsitty testified that he watched Roberts depart from the agency facility in the agency pickup truck on his way to the concrete pour and that Barrett was on the passenger side of the seat and Ben was in the middle. HT at 8. In contrast, Ben initially testified that Roberts was on the passenger side, but later testified that Barrett was on the passenger side. HT at 38, 43-44. Similarly, Etsitty contended in his initial statement that he helped "load shovels, hammers, and power tools" into the pickup truck, but at the hearing he testified that he loaded shovels, picks, and trowels into the pickup truck.[3] IAF 3, Tab 3, Subtab 4o; HT at 13. Ben testified, however, that there were only a couple of shovels in the back of the pickup truck. HT at 38.

[3] To the extent that the appellants refer to Etsitty's deposition in their petition for review, we have previously held that we will not consider it under 5 C.F.R. § 1201.115. *Barrett*, 57 M.S.P.R. at 638 n. 5.

Although the administrative judge did not mention every inconsistency in the statements and hearing testimony of Etsitty, Slim, and Ben, the administrative judge discussed several of the inconsistencies and found that they did not affect the credibility of the three witnesses. RID at 13. The fact that the administrative judge did not mention every inconsistency does not mean that he did not fully consider all of the evidence. *Marques*, 22 M.S.P.R. at 132. In any event, we have fully considered the inconsistencies cited above and all of the other inconsistencies cited by the appellants in their petition for review and find that the appellants have failed to show that the administrative judge erred in his fact findings.

The appellants also argue that the administrative judge failed to consider that Etsitty admitted that he had no independent recollection of the date of the concrete pour and that he only remembered the exact date after the agency representative informed him of it. PFR at 22-23. Although the appellants' assertion is true, the fact that Etsitty had no independent recollection of the date on which the concrete pour occurred does not reduce the probative value of his testimony regarding the events on the date of the concrete pour.

Thus, we believe that the administrative judge correctly found the testimony of Etsitty, Ben, and Slim credible. *See Hillen*, 35 M.S.P.R. at 458. Although there may be some inconsistency regarding the details, they provided consistent testimony regarding the core issues in this appeal. That testimony is also consistent with Martin's testimony.

The administrative judge correctly found Liggins and Moser not credible.

On review, the appellants also argue that the administrative judge erred in his credibility determinations regarding Liggins and another friend of Wiggins who allegedly assisted in the fish pond project, John Moser. PFR at 24-27. Liggins testified that he helped Wiggins with the fish pond project for 4 days, Friday through Monday. HT at 207-08. He testified that he helped set the forms for the fish pond and that "on that weekend we poured cement for it, and the following Monday we finished up." HT at 207. Subsequently, however, Liggins testified that during the week the work on the fish pond required hammers and hand saws and that, on Friday, Wiggins was assisted by himself, two day laborers, and individuals named John and Andy. HT at 208. Liggins testified that he did not know Barrett and that Barrett was not present at any time, and that he knew Roberts and Slim and that they were not present on either day. HT at 209-10.

Moser testified that he helped dig the hole for the fish pond and helped pour the cement for the fish pond approximately a week later. HT at 153. He testified that Wiggins was assisted in pouring the cement by Liggins, an individual named Andy, and two day laborers. *Id.* Moser also testified that neither Roberts nor Barrett was present at the cement pour and that he did not know Ray Ben. HT at 153-55.

The administrative judge discredited Liggin's testimony because he testified that he completed the cement forms over the weekend and that the cement was poured on a Monday. RID at 9. The evidence reflects that the cement was poured on a Thursday.

With regard to Moser's testimony, the administrative judge discredited it because the appellants did not offer Moser as an exculpatory witness until the time of the first hearing and they did not identify him as a source of evidence in their reply to the notice of proposed removal or in their petitions for appeal. RID at 9. The administrative judge also noted that both Liggins and Moser admitted that they were longtime friends of Wiggins. *Id.*; HT at 151-52, testimony of Moser; HT 206-07, testimony of Liggins.

With regard to Liggins, we note that the administrative judge correctly discredited his testimony because of the inconsistencies in his testimony regarding the day of the week of the cement pour. Liggins' misstatement about the date of the cement pour is not a minor error, such as stating the cement was poured on Wednesday or stating that it occurred on June 8, 1988, but rather goes to the heart of his version of how the project was done and calls his credibility into question. In addition, as noted by the administrative judge, Liggins is a personal friend of Wiggins. RID at 9. Finally, to believe Liggins' version of events, it is necessary to reject the credible and consistent testimony of Etsitty, Ben, Slim, and Martin. *See Hillen*, 35 M.S.P.R. at 458.

After reviewing Moser's testimony, the administrative judge's findings regarding this testimony, and the appellants' assertions on review, we find that the administrative judge's reasoning in discrediting Moser's testimony was faulty. *See* RID at 9; PFR at 24-27. We find that the fact that the appellants did not offer Moser as a witness before the agency or in their petitions for appeal is not a proper basis to discredit his testimony in these appeals. The point in time at which a witness is first presented for consideration is

not, by itself, an appropriate basis by which to determine credibility. *See Hillen*, 35 M.S.P.R. at 458.

Based on the other evidence in the record, however, we believe that the administrative judge correctly discredited Moser's testimony. As noted by the administrative judge, Moser is a personal friend of Wiggins and, more importantly, to believe his version of events, it is necessary to reject the credible and consistent testimony of Etsitty, Ben, Slim, and Martin. *See Hillen*, 35 M.S.P.R. at 458.

The administrative judge correctly found the appellants' testimony not credible.

The appellants also argue on review that the administrative judge erred in not properly considering their testimony, particularly in light of their combined 38 years of agency employment, their good work records, their positions of authority, and the fact that Roberts and Barrett are still employed by the agency. PFR at 28-29. Contrary to the appellants' assertions, the administrative judge considered the appellants' testimony and simply found them not credible. RID at 6, 10. With regard to the specific factors cited by the appellants on review, they are irrelevant to a valid credibility determination. *See Hillen*, 35 M.S.P.R. at 458.

The appellants also argue that the administrative judge failed to consider the documentary and testimonial evidence that showed that Roberts and Barrett were at work on June 9, 1988. PFR at 29-32. The administrative judge fully considered this evidence and concluded that it did not support the appellants' version of events. RID at 10-11. Similarly, the administrative judge fully considered the significance of the pickup truck mileage log and

concluded that it did not support the appellants' version of events. RID at 11. The appellants' allegations on review constitute mere disagreement with the administrative judge's explained fact findings. With regard to the appellants' claim that it is inherently unlikely that Barrett and Roberts would have the foresight to falsify the laboratory report and vehicle mileage log more than a year in advance of any disciplinary action, we note that it is not uncommon for individuals to cover up evidence of their wrongdoing.

The administrative judge correctly sustained four of the charges against Wiggins and one of the charges against Barrett and Roberts.

Based on the discussion above, we find that the administrative judge correctly sustained the charges that Wiggins misused a government vehicle, misused government equipment, and misused government employees. RID at 15-16. We also find that the administrative judge correctly sustained the charge that Wiggins falsified government time and attendance reports by representing that his subordinates were on duty when they were assisting with the cement pour. RID at 16. The administrative judge did not sustain the final charge against Wiggins of making a false claim on his own time and attendance report, RID at 2 n. 1, and the agency has not petitioned for review of that finding. Thus, we will not consider the charge further. We also find that the administrative judge correctly found that Barrett and Roberts made a false claim on their respective time and attendance reports when they represented that they were on duty during the time period that they were assisting with the cement pour. RID at 17.

With regard to the charge that Barrett and Roberts misrepresented or concealed a material fact in connection with an agency investigation, the agency alleged that, when the area personnel officer inquired about the misconduct, Barrett and Roberts provided false information. IAF 1, Tab 3, Subtab 4h; IAF 2, Tab 3, Subtab 4h. According to the agency, Roberts stated in response to the inquiry that he did not remember anything about the building of a fish pond, while Barrett stated that he only worked on the fish pond on his own time. IAF 1, Tab 3, Subtab 4h; IAF 2, Tab 3, Subtab 4h. The agency also charged that Barrett and Roberts failed to report an act of fraud, waste, and abuse when they failed to disclose to agency officials that Wiggins did not charge them leave for the time that they worked on the fish pond. IAF 1, Tab 3, Subtab 4h; IAF 2, Tab 3, Subtab 4h. The administrative judge sustained these charges. RID at 16-17.

After the remand initial decision was issued, the Board issued *Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586 (1994). In *Walsh*, 62 M.S.P.R. at 594, we recognized that the Board had previously held, as did the administrative judge in this appeal, that an agency may separately charge an employee with misconduct and with making false statements about the alleged misconduct, when the falsification concerns a matter of official interest to the agency. We determined in Walsh, however, that these holdings were based on a faulty analysis of the decision of the U.S. Court of Appeals for the Federal Circuit in *Grubka* v. *Department of the Treasury*, 858 F.2d 1570, 1574-75 (Fed. Cir. 1988), holding that such a charge was erroneous as a matter of law. We therefore held, following *Grubka*, that an agency may not separately charge an employee with misconduct

and with making false statements regarding the alleged misconduct. *Walsh*, 62 M.S.P.R. at 594-95.

Thus, in these appeals, based on our decision in Walsh, we find that the agency's charge against Barrett and Roberts of misrepresentation or concealment of a material fact in connection with an investigation is improper, and the administrative judge erred as a matter of law by sustaining them. *Id.*, at 595. With regard to the charge that Barrett and Roberts failed to report an act of fraud, waste, and abuse by Wiggins, that charge means that Barrett and Roberts were required to report Wiggins' misconduct of not charging them leave for the time during which they worked on the fish pond during duty hours. Such a disclosure, however, would have necessitated implicating themselves in the misconduct of filing a false time and attendance report. A charge based on such a requirement of self-implication is contrary to our decision in *Walsh*, and thus the administrative judge erred as matter of law by sustaining the charge that Barrett and Roberts failed to report such an act of fraud, waste, and abuse.[4] *Id.*, at 595.

Although not cited by the agency, we note that 5 C.F.R. § 2635.101(b)(11) sets forth the ethical requirement that Federal employees "shall disclose waste, fraud, abuse, and corruption to appropriate authorities." We discern nothing in the regulation, however, that calls into question the discussion above and the Board's holding in Walsh regarding self-implication. Accordingly, we find that, despite the requirement of 5 C.F.R. § 2635.101(b)(11), an employee cannot be

---

[4] Our holding in no way precludes an agency from bringing a charge of engaging in waste, fraud, and abuse, or similar charges under other circumstances.

required to make a disclosure that would implicate himself or herself in wrongdoing. *See Walsh*, 62 M.S.P.R. at 595; *see also Walsh, concurring opinion of Chairman Erdreich*, at 599 (stating that the charge of making false statements in an agency investigation must be set aside as inconsistent with Federal Circuit precedent despite statutory and regulatory admonitions requiring truthfulness of Federal employees).

The penalty imposed by the agency against Wiggins was within the tolerable limits of reasonableness.

The administrative judge considered the penalty imposed by the agency against Wiggins in light of the fact that he did not sustain all of the charges. RID at 19-20. The administrative judge determined that removal was within the tolerable limits of reasonableness for Wiggins' misconduct. RID at 17-20. We have considered the arguments on review, and find that the administrative judge did not err in his determination.

The maximum reasonable penalty for the sustained misconduct of Barrett and Roberts is a letter of reprimand.

Regarding the penalties imposed against Barrett and Roberts, when not all of the charges are sustained, the Board will consider carefully whether the sustained charges merit the penalty imposed by the agency. *McIntire v. Federal Emergency Management Agency*, 55 M.S.P.R. 578, 588 (1992); *Douglas v. Veterans Administration*, 5 MSPB 313, 5 M.S.P.R. 280, 308 (1981). In *Douglas*, 5 M.S.P.R. at 305, the Board articulated a number of factors to consider in determining the appropriateness of a penalty.

Here, Barrett and Roberts engaged in misconduct by falsely claiming on their time and attendance reports that they were at work while assisting Wiggins with the fish pond. The Board has held that the falsification of a time and attendance report is a serious offense that can warrant removal. *See Rohn v. Department of the Army*, 30 M.S.P.R. 157, 158-59 (1986). Whether a particular act of falsification warrants removal must be determined in light of the circumstances of each case. *Perez v. U.S. Postal Service*, 48 M.S.P.R. 354, 356-57 (1991).

In these appeals, we find that there are a number of facts that support a lesser penalty than the demotions and suspensions imposed by the agency. The length of time involved is only 2 hours and, because Barrett and Roberts spent the time working at their supervisor's residence, we cannot find that they acted for personal gain. Also, they acted with the knowledge and approval of their supervisor. In addition, the agency cited no prior disciplinary actions against either Barrett or Roberts and, at the time of the agency's actions, Barrett had approximately 18 years of service with the agency and approximately 24 years of Federal service, and Roberts had 4 years of service with the agency and nearly 7 years of Federal service.

Accordingly, in light of all of the circumstances in these appeals, we find that a letter of reprimand is the maximum reasonable penalty for the sustained misconduct of Barrett and Roberts. This finding is consistent with the finding in *Coppola v. U.S. Postal Service*, 47 M.S.P.R. 307, 315, 319 (1991), where the Board held that a letter of reprimand was the maximum reasonable penalty for a single instance of 32 to 37 minutes of absence without leave.

ORDER

We ORDER the agency to cancel the demotions and suspensions of Barrett and Roberts and to replace those actions with a letter of reprimand. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish these actions within 20 days of the date of this decision.

We also ORDER the agency to issue checks to Barrett and Roberts for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER Barrett and Roberts to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue checks to Barrett and Roberts for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform Barrett and Roberts in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, Barrett and Roberts should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, Barrett and Roberts may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why Barrett and Roberts believe that there is insufficient compliance,

and should include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board in these appeals. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

Member Amador issues an opinion concurring in part and dissenting in part.

For the Board:

ROBERT E. TAYLOR,

WASHINGTON, D.C.

SEPARATE OPINION OF MEMBER ANTONIO C. AMADOR.

Although I concur in all other aspects of the Board's decision, I respectfully dissent from the majority's mitigation of the penalty to be imposed upon Barrett and Roberts. I agree that, in light of the

Board's reversal of three of the four charges against Barrett and Roberts, the agency-imposed penalty should be mitigated. However, I believe that a mere reprimand is an entirely inappropriate and unreasonable penalty in light of the seriousness of the sustained charges of falsification of time and attendance reports. Moreover, it is entirely inconsistent with the Board's treatment of falsification cases in the past. A 30-day suspension, at a minimum, would be more appropriate and would meet the Board's responsibility to bring the penalty within the parameters of reasonableness. *Montalvo v. U.S. Postal Service*, 50 M.S.P.R. 48, 51 (1991).

In this case, there are aggravating factors which must be considered in tandem with the mitigating factors noted by the majority. The Board is unanimously sustaining the removal of Wiggins for misusing a government vehicle, government equipment, and government employees. It is thus inappropriate, in determining the appropriate penalty to impose on Barrett and Roberts, to overlook the Board's conclusion that the two were willing participants in an act of fraud, waste, and abuse, having driven a government pickup truck with government equipment to Wiggins' house, and having falsified their duty logs and the truck's mileage log to conceal their actions.

I agree that, in the context of this case, Barrett and Roberts cannot be charged with failing to come forward to report this fraud, waste, and abuse, as such a report would have placed them in the position of disclosing their own misconduct. *See* maj. at 201-202. However, their willing participation in the underlying misconduct should certainly be considered in determining the reasonableness of the penalty. This case is, therefore, quite distinguishable from *Coppola*

v. U.S. Postal Service, 47 M.S.P.R. 307 (1991), wherein Coppola extended his lunch hour by 32 to 37 minutes on one occasion. By contrast, not only were Barrett and Roberts absent from duty, an absence covered up with false time and attendance report claims, but *additionally*, during that brief absence, they were willing participants in several counts of fraud, waste, and abuse. Although the amount of time that they were absent from work was brief, this is not a mere absence-without-leave case, and it is quite incredible that the majority treats it as such. Barrett's and Roberts' unauthorized absence, which they attempted to cover up by falsifying their time and attendance reports, was attributable to their participation in illegal activity.

The majority opinion makes note of the fact that Barrett and Roberts were doing personal work for their supervisor with his knowledge and approval as support for mitigation to a reprimand. However, this personal work involved misutilization of government equipment and a government vehicle, as well as the involvement of other employees who, along with the appellants, were charging their "personal work" to the government. The appellants clearly knew that this "personal work" was not authorized—they attempted to cover their tracks by falsifying the daily log and the truck mileage log. Moreover, it is of little relevance that they were acting with the knowledge and approval of their supervisor; such circumstances would not excuse shoplifting or bank robbery!

As the majority opinion acknowledges, the Board has held that the penalty of removal may be appropriate in falsification cases, depending on the facts of the individual case. See maj. at 202. The substance of a falsification charge is the issue of an employee's

honesty. *Beardsley v. Department of Defense*, 55 M.S.P.R. 504, 511 (1992), *aff'd*, 5 F.3d 1504 (Fed. Cir. 1993) (Table). An employee's falsification of an agency document goes to the core of the employer-employee relationship and impeaches the employee's reliability, veracity, trustworthiness, and ethical conduct. *Wier v. Department of the Army*, 54 M.S.P.R. 348, 354 (1992); *Hanna v. Department of the Army*, 42 M.S.P.R. 233, 240 (1989). On more than one occasion, the Board has held that *removal* for falsification of government documents promotes the efficiency of the service because such falsification raises serious doubts regarding the employee's honesty and fitness for employment. *See Hamilton v. Department of the Air Force*, 52 M.S.P.R. 45, 47 (1991), *aff'd*, 980 F.2d 744 (Fed. Cir. 1992) (Table); *see also Kuhn v. Federal Deposit Insurance Corporation*, 48 M.S.P.R. 393, 398-99 (1991) (removal was within the tolerable limits of reasonableness where the offense of intentional submission of an incorrect travel voucher raised serious doubts as to the employee's trustworthiness and reliability), *aff'd*, 954 F.2d 734 (Fed. Cir. 1992) (Table); *Gonzalez v. U.S. Postal Service*, 30 M.S.P.R. 82, 85-86 (1986) (where the Board failed to sustain the charges of lying to postal investigators and failure to cooperate in a postal investigation, the charge of filing a false travel voucher and supporting documentation was sufficient to warrant removal due to the irretrievable loss of trust and confidence in the employee's integrity, veracity, and value as a government witness), *aff'd*, 818 F.2d 874 (Fed. Cir. 1987) (Table); *Trybul v. Department of the Army*, 22 M.S.P.R. 290, 292 (1984), *aff'd*, 776 F.2d 1059 (Fed. Cir. 1985) (Table); *Martinez v. Department of Defense*, 21 M.S.P.R. 556, 558 (1984) (removal penalty sustained,

despite the de minimis amount of money involved in the false travel vouchers and the employee's long-standing successful service, where the agency demonstrated that the falsification of a travel voucher directly related to employee's performance of his official duties and had a negative effect upon his supervisor's confidence in him and ability to trust him), *aff'd*, 765 F.2d 158 (Fed. Cir. 1985) (Table); *Stokes v. Department of Agriculture*, 9 MSPB 22, 9 M.S.P.R. 372, 376 (1982) (the Board sustained the removal of the employee for falsification of a travel voucher and supporting documents); Initial Decision at 7.

Recently, in *Tanner v. Department of Transportation*, 65 M.S.P.R. 169 (1994) (Chairman Erdreich dissenting), the Board similarly reversed a charge of misrepresentation, per *Walsh*, but upheld the penalty of removal in a case involving a falsification of a travel voucher. As in the instant case, the appellant's falsification of records raised serious concerns about her judgment, reliability, veracity, trustworthiness, and ethical conduct. Maj. at 194. In another recent decision, *Wier*, 54 M.S.P.R. at 354-55, the Board found that a 30-day suspension was a reasonable penalty for an employee's filing of a false travel voucher, despite a number of mitigating factors. In *Hart v. U.S. Postal Service*, 53 M.S.P.R. 228, 231-32 (1992), the Board mitigated a 60-day suspension to a 30-day suspension for the employee's falsification of his time and attendance report by 1 hour. In *Parsons v. Department of the Air Force*, 21 M.S.P.R. 438, 446 (1984), the Board mitigated a removal to a 45-day suspension for falsifying a sick leave form and for being absent without leave for a day.

Certainly, the actions of Barrett and Roberts with regard to the "fish pond" incident were no less serious then the offenses of Wier, Hart, and Parsons (Tanner's falsification was more serious, due to her supervisory position). Thus, in light of the specific circumstances of this case, a similar substantial penalty in the form of a suspension is appropriate.

The Board majority's decision to instead mitigate the penalty to a mere reprimand illustrates, once again, the current Board's general disregard for its own precedent (which the majority decision consciously ignores, citing only the *Coppola* decision as support for its mitigation of the penalty to a reprimand; as noted above, the *Coppola* case involved a far less serious offense than the instant case), its willing usurpation of the agency's role in determining the appropriate penalty, and the current Board's arbitrariness and inconsistency in reviewing the agency's selection of a penalty (indeed, this inconsistency is demonstrated by the removal penalty imposed upon Wiggins, in contrast to the reprimands applied to his accomplices). Accordingly, I strongly dissent from this aspect of the Board majority's decision.

APPENDIX G

UNITED STATES OF AMERICA
MERIT SYSTEMS PORTECTION BOARD

No. AT-0752-94-0313-I-1

HARRY R. MCMANUS, APPELLANT

v.

DEPARTMENT OF JUSTICE, AGENCY

MERIT SYSTEMS PROTECTION BOARD

[Filed: Feb. 17, 1995]

Before: ERDREICH, Chairman, PARKS, Vice Chairman, and AMADOR, Member.

OPINION AND ORDER

The agency has petitioned for review of an initial decision that mitigated the appellant's demotion to a 14-day suspension. For the reasons set forth below, we DENY the petition for failure to meet the criteria for review under 5 C.F.R. § 1201.115, REOPEN the appeal on our own motion under 5 C.F.R. § 1201.117, and AFFIRM the initial decision AS MODIFIED by the Opinion and Order, stili MITIGATING the appellant's demotion to a 14-day suspension.

BACKGROUND

The appellant petitioned for appeal from the agency's action demoting him from the position of Supervisory Correctional Officer, GS-11, step 3, to the position of Correctional Officer, GS-8, step 10. *See* Initial Appeal File (IAF), Tab 1; Tab 4, Subtab 4a. The agency based its action on charges of conduct unbecoming a supervisor and making false statements during an official investigation. *See id.*, Tab 4, Subtabs 4b, 4g.

Concerning the former charge, the agency asserted that the appellant had admitted during an interview "to making various sexual innuendoes to a female subordinate." *See id.*, Tab 4, Subtab 4g. The record of that interview shows that he admitted having engaged in a conversation with the subordinate (Officer White) in which he referred to "a bra size;" asked her about her preferred sexual positions; told her he had a "bulge" in his pants thinking about the subject; and "made a reference to the effect of 'Can you see how much you excite me?'" when talking to Officer White. *See id.*, Tab 4, Subtab 4l. Regarding its other charge, the agency produced a sworn statement from the appellant admitting that he had lied during another investigative interview regarding these comments. *See id.*, Tab 4, Subtab 4m.

The appellant waived his right to a hearing, so the case was decided based upon the written record. *See id.*, Tab 1; Initial Decision (I.D.) at 1-2. The administrative judge sustained both charges. He found that the appellant had made sexual comments to Officer White. *See* I.D. at 2-3. The administrative judge also concluded that the appellant had submitted a statement during an investigation denying that he had

made such remarks with the intent to deceive the agency. *See id.* at 3-5.

Nevertheless, he mitigated the demotion to a 14-day suspension. *See id.* at 6-7. The administrative judge conceded that, under the agency's table of penalties, a charge of conduct unbecoming would warrant a penalty ranging from official reprimand to removal. *See id.* at 6, citing IAF, Tab 4, Subtab 4q. He found, however, that joking sexual conversations were common in the workplace and that Officer White often participated in or initiated them. *See id.* at 3 n. 2, 7, citing IAF, Tab 4, Subtabs 4e, 4n. He concluded regarding the comments at issue that "[t]he agency's penalty may have been warranted had the comments been totally unwelcome and not mutually exchanged between the appellant and Officer White, but such was not the case here." *See id.* at 6-7 (emphasis in original). He also noted that the appellant had eleven years of service with the agency without prior discipline. *See id.* at 7. For those reasons, the administrative judge mitigated the agency's penalty selection. *See id.* The agency has petitioned for review of the initial decision, contending that the administrative judge erred in mitigating the penalty. *See* Petition for Review File (PFRF), Tab 1.

ANALYSIS

When the administrative judge issued his initial decision, he did not have the benefit of the Board's decision in *Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586, 593-96 (1994). Relying on the court's decision in *Grubka v. Department of the Treasury*, 858 F.2d 1570, 1574-75 (Fed. Cir. 1988), the Board held that an agency may not charge an employee with misconduct and separately charge her with making a

false statement regarding the alleged misconduct. *See Walsh*, 62 M.S.P.R. at 593-96. As discussed above, the agency charged the appellant here with conduct unbecoming a supervisor and with making false statements concerning that conduct. *See* IAF, Tab 4, Subtab 4g. In accordance with *Walsh*, then, the latter charge was improper and may not be considered. *See* 62 M.S.P.R. at 595-96. When the Board does not sustain all of the agency's charges and specifications, we must carefully consider whether the sustained misconduct merits the penalty imposed by the agency. *See Douglas v. Veterans Administration*, 5 MSPB 313, 5 M.S.P.R. 280, 308 (1981). In doing so, we analyze whether the agency conscientiously considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *See id.*, 5 M.S.P.R. at 306.

Regarding the penalty issue, the agency asserts that the false statement made by the appellant regarding his comments to Officer White should be considered for the purpose of impeaching his credibility. It contends that the Board should therefore credit Officer White's account over the appellant's and determine that she was not a willing participant in conversations of a sexual nature with the appellant. On that basis, the agency argues, mitigation of the penalty is not warranted. *See* PFRF, Tab 1 at 6-7. In *Walsh*, however, the Board held that a false denial of misconduct cannot result in harm to the accused and that an appellant's false statements thus may not be considered in determining the penalty. *See* 62 M.S.P.R. at 595-96. We therefore reject the agency's argument and decline to consider the appellant's false statement in analyzing the penalty issue.

The record contains a statement by the appellant that sexual joking and innuendo were common in the workplace and that Officer White had a practice of engaging in sexually explicit conversations; he also maintained that her complaint about his comments to her had been motivated by her unhappiness about his criticism of her work performance. *See* IAF, Tab 4, Subtab 4e-1. Nothing in the record specifically contradicts the remarks about the office environment and Officer White's alleged practice. A statement by another employee asserted that Officer White had been a willing participant in sexually explicit conversations and had engaged in sexually provocative behavior. *See id.*, Tab 4, Subtab 4f. Moreover, Officer White admitted that she had initially participated in sex-related joking with the appellant, although she also alleged that she had later become uncomfortable with the joking and had told him that he could get in trouble for making such comments; she contended that she had then told him (apparently after the comments at issue had been made) that he should leave her alone. *See id.*, Tab 4, Subtab 4n-12. The appellant, however, has consistently denied that Officer White ever specifically discouraged his remarks. *See id.*, Tab 4, Subtabs 4e-1, 4i, 4l, 4n-3. The record also does not contain any first-hand accounts by other individuals confirming Officer White's account of this matter. In addition, another statement in the record by Officer White provides some support for the appellant's assertion that she was angry about his criticism of her work performance. *See id.*, Tab 4, Subtab 4n-11.

Based on our review of the record, then, it appears undisputed that sexual joking and innuendo did occur in the workplace and that Officer White willingly par-

ticipated in at least some of that activity. The agency nonetheless argues that the appellant's misconduct was highly serious, especially for a supervisory employee in a correctional facility, and that the existence of an atmosphere in which Officer White and others made sex-related jokes and comments is therefore irrelevant to the penalty issue. *See* PFRF, Tab 1 at 2-5. As an initial matter, we certainly agree that the appellant's comments were improper. Supervisors are held to a higher standard of conduct than other employees, and they have a responsibility to ensure that the work environment is free of offensive comments of a sexual nature. *See Kirk v. Department of the Navy*, 58 M.S.P.R. 663, 671-72 (1993); *Jackson v. U.S. Postal Service*, 48 M.S.P.R. 472, 476 (1991). Moreover, correctional officers must conform to a higher standard of conduct than non-law enforcement employees, and the Department of Justice is permitted wide discretion in controlling the work-related conduct of those employees charged with maintaining the integrity of our prison system. *See Crawford v. Department of Justice*, 45 M.S.P.R. 234, 237 (1990).

Contrary to the agency's argument, however, see PFRF, Tab 1 at 5, we have not held that the office environment is irrelevant to the penalty issue in cases like this one. The holding cited by the agency states that an office atmosphere of sexual joking and innuendo would not be considered on the issue of whether the charge of conduct unbecoming a supervisor/sexual harassment could be sustained; that holding did not address the issue of whether the penalty imposed was reasonable. *See Lowe v. Department of Justice*, 63 M.S.P.R. 73, 76-77 (1994). Moreover, in analyzing whether mitigation was warranted

in cases involving sexual misconduct, the Board has explicitly considered whether an office atmosphere of sexual joking existed and whether the misconduct at issue fell within the bounds of such an atmosphere or surpassed it. *See Jordan v. U.S. Postal Service*, 44 M.S.P.R. 225, 232-33 (1990), *reconsideration denied*, 49 M.S.P.R. 544 (1991); *Vaughan* v. *Department of the Navy*, 40 M.S.P.R. 411, 417-13 (1989). We therefore reject the agency's argument that this issue may not be considered in reviewing the penalty issue.

As the administrative judge noted, the appellant had 11 years of service with the agency and does not appear to have been disciplined during that period. *See* I.D. at 7; IAF, Tab 4, Subtab 4a. Moreover, the sexual misconduct discussed above did not involve any physical contact with Officer White. *See Alsedek v. Department of the Army*, 58 M.S.P.R. 229, 241 (1993) (physical contact in sexual misconduct cases is an aggravating factor which may warrant a more severe penalty than might otherwise be imposed). Finally, it appears that the appellant's sexual comments to Officer White were made in an environment in which such remarks were common and in which Officer White also participated. *See Jordan*, 44 M.S.P.R. at 232-33; *Vaughan*, 40 M.S.P.R. at 417-18. Therefore, even after considering the undisputed seriousness of the appellant's misconduct, we find that the administrative judge did not err in mitigating his demotion to a 14-day suspension.

ORDER

We ORDER the agency to cancel the appellant's demotion and to substitute a 14-day suspension without pay, retroactive to the effective date of the demotion, January 9, 1994. *See Kerr v. National Endow-*

ment for the Arts, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

For the Board:

ROBERT E. TAYLOR,

WASHINGTON, D.C.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 96-3028

JAMES B. KING, DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT

v.

HARRY R. MCMANUS, RESPONDENT
AND
MERIT SYSTEMS PROTECTION BOARD
RESPONDENT

ORDER

[Filed: Nov. 4, 1996]

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the PETITIONER, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on November 12, 1996.

Dated: November 4, 1996

FOR THE COURT,
MELVIN L. HALPERN, ACTING CLERK

By \s\ BRIAN P. LEDUC
BRIAN P. LEDUC
Associate Chief Deputy Clerk

cc: TODD M. HUGHES
MARTHA B. SCHNEIDER

KING V MCMANUS, 96-3028
(MSPB - AT0752940313R-1)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a record.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Nos. 95-3745, -3746

JAMES B. KING, DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT
PETITIONER

v.

LESTER E. ERICKSON, JR., RESPONDENT
AND
JEANETTE M. WALSH, RESPONDENT
AND
MICHAEL G. BARRETT AND JEROME K. ROBERTS
RESPONDENTS
AND
SHARON KYE, RESPONDENT
AND
MERIT SYSTEMS PROTECTION BOARD
RESPONDENT

ORDER

[Filed: Nov. 4, 1996]

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the PETITIONER, and response thereto having been invited by the court and filed by two RESPONDENTS, and the petition for rehearing having been referred to the

panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on November 12, 1996.

Dated: November 4, 1996

FOR THE COURT,
MELVIN L. HALPERN, ACTING CLERK

By \s\ BRIAN P. LEDUC
BRIAN P. LEDUC
Associate Chief Deputy Clerk

cc: TODD M. HUGHES
J. EUCHLER, P. MARTH, H. BEST, J. KOCH

MARTHA B. SCHNEIDER

KING V ERICKSON, 95-3745, -3746
(MSPB - DA0752930295R-1)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

Docket No. 96-1395

IN THE

Supreme Court of the United States

October Term, 1996

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

LESTER E. ERICKSON, JR., ET AL.

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Petitioner

v.

HARRY R. McMANUS, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT KYE'S BRIEF IN OPPOSITION

Neil C. Bonney, Esquire
Counsel for Respondent Sharon Kye
NEIL BONNEY & ASSOCIATES, P.C.
4652-A Haygood Road
Virginia Beach, Virginia 23455
(757) 460-3477

18 pp

QUESTION PRESENTED

WHETHER IT IS PERMISSIBLE FOR A FEDERAL AGENCY TO SEPARATELY CHARGE AN EMPLOYEE WITH MAKING FALSE STATEMENTS DURING AN AGENCY INVESTIGATION WHEN THE EMPLOYEE DENIES THE MISCONDUCT AND THE AGENCY CHARGES THE EMPLOYEE WITH THE UNDERLYING MISCONDUCT

STATEMENT REQUIRED BY RULE 29.6

The Petitioner has correctly listed the parties to the proceeding. There is no corporation which is a party to this proceeding.

Table of Contents

Table of Authorities

No. 96-1395

In the

Supreme Court of the United States

October Term, 1996

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

LESTER E. ERICKSON, JR., ET AL.

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

HARRY R. MCMANUS, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT KYE'S BRIEF IN OPPOSITION

Pursuant to Rule 15 of the Court's rules, Respondent Sharon Kye, respectfully files this brief in opposition to the Office of Personnel Management's Petition for a Writ of Certiorari.

CITATIONS OF OPINIONS AND JUDGMENTS DELIVERED BY THE COURTS BELOW AND NOTICE THAT JURISDICTION OF THIS COURT IS CORRECTLY PRESENTED BY PETITIONER

The decision of the United States Court of Appeals for the Federal Circuit is reported as King v. Erickson, et al., 89 F3d 1575 (Fed. Cir. 1996). The decision of the Merit Systems Protection Board is Kye v. Defense Logistics Agency, 64 MSPR 570 (1994). Jurisdiction is correctly presented by petitioners.

STATEMENT OF THE CASE

The petition arises from multiple disciplinary proceedings against government employees. In the case of Respondent Kye, the Administrative Judge sustained four of the original six charges of misconduct and upheld the appellant's removal. The respondent appealed to the Merit Systems Protection Board (MSPB or Board), who upheld three of the four remaining charges, but reversed the charge of providing false information in an official investigation, based on *Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586 (1994), which followed the ruling of *Grubka v. Department of the Treasury*, 858 F.2d 1570 (Fed. Cir. 1988). Pet. App. p. 63a[1]. The

[1]"Pet. App. p. ___" refers to the Appendix filed by the petitioner in this case.

Board also mitigated the penalty from removal to a 45-day suspension, finding it to be "the *maximum* reasonable penalty for the sustained charges." Pet. App. p. 64A. (emphasis added). The Federal Circuit affirmed the decision. Pet. App. p. 2a.

ARGUMENTS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The Constitution affords every person in the United States due process before the government can deprive him or her of life, liberty or property. A federal government employee has a property interest in his or her employment with the government, and as such, the federal government must provide due process to its employee before terminating him or her. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *See also*, 5 U.S.C. § 7513 (1994). Government employees are entitled to, among other things, an opportunity to respond to the charges on which the government has based a decision to terminate. 5 U.S.C. § 7513(b) (1994). The Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), held the opportunity must be meaningful, not merely pretextual. *Id.* at 546. The court of appeals in the case at bar, relying on *Grubka*, held in order to protect the employee's meaningful opportunity to respond to charged misconduct, an agency cannot charge an employee with making false statements during an agency investigation when the employee denies the misconduct and the agency charges the employee with the underlying misconduct. Pet. App. p. 21a. The petitioner seeks to

deny federal employees a meaningful opportunity to respond to charges, arguing that the decision of the court of appeals which permits an employee to deny the charges and call for proof creates a right to lie for the employees. In support of this erroneous contention, the petitioner cites numerous cases, none of which have false statements as an issue, and therefore do not address the issue.[2]

---

[2]See, Petition, p. 18, n.4.

Washington v. Harper, 494 U.S. 210 (1990). The rights of a mentally ill inmate to pre-medication as opposed to post-medication review of involuntary medication were at issue. The case is applicable to the petition before the Court today only in holding, "[t]he procedural protections required by the Due Process Clause must be determined with reference to the rights and interests at stake in the particular case." *Id.* at 229; citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Hewitt v. Helms*, 459 U.S. 460, 472 (1983); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 12 (1979).

Hewitt v. Helms, 459 U.S. 460 (1983). The required level of review of an inmate's statements and facts surrounding an inmate's restricted confinement after a prison riot were at issue. The Court held that prison administrator's decisions deserved wide-range deference, so that even if impunity for false statements were at issue, the Court's standard of review would not apply to "procedural rules designed for free citizens in an open society." *Id.* at 472 (citations omitted).

Vitek v. Jones, 445 U.S. 480, (1980). The right of an inmate to notice and opportunity to be heard prior to a decision to transfer to mental hospital were at issue. Once again the absence of false statements as an issue and the different level of deference and review make the case inapplicable to the petition presently

The petitioner also argues that procedural due process is not at issue in charging an employee with both the misconduct and the false information charges. However, as held by the Board and affirmed by the court of appeals, to allow the agency to charge an employee with both charges any time he or she denies the charged misconduct, effectively and automatically creates a second charge, unless the employee admits to the misconduct with which he or she is charged. Pet. App. p. 15a; 29a; 39a. Thus, any time an employee contests an agency's action and articulates a different version of the truth than the "official" version, that employee risks an additional or subsequent falsification charge if every factual finding (based on a mere preponderance) does not go her way. The charge of falsification is of such magnitude and potential penalty, few employees would risk the consequences, which include termination, for the sake of availing themselves of their right to respond to the misconduct charged against them. Pet. App. p. 17a. In essence, even minor charges would become removal offenses, if denied,

---

before the Court.

Matthews v. Eldridge, 424 U.S. 319 (1976). The Court set forth the test for determining the sufficiency of the provided level of procedural due process. The issues before the Court were based on the rights of disability recipients to review of termination of benefits decisions, with no accusation of false statements.

While these are only a sampling of the cases which the petitioner cites in support of its statement, none of the cases cited in n. 4 had false statements as an issue.

based on the additional charge of making false statements. As such, the employee's procedural due process rights would be constructively denied, and the employee's right to respond to charges would no longer be meaningful, a violation of the Constitution.

The petitioner would have the Court believe that employees have nothing to fear because only valid charges are brought, and if the employee is telling the truth, then the underlying charges will not be sustained. This theory decries the basis for the country's entire justice system. Investigation of past events is not a perfect science; mistaken identification, misinformation and accusing the innocent occur on a daily basis. In addition, individuals might have a technical basis for denying a suspiciously or unfairly worded agency charge and requiring proof on the allegation. It is for this reason that our justice system holds the accused innocent until proven guilty and allows the accused to plead not guilty, thereby forcing the accuser to prove guilt.[3] The level of proof required of the agency is by a

---

[3] "A person charged with an offense can deny the charge and plead not guilty, either because he is not or to force the charging party to prove the charge. Otherwise, a person could never defend himself against a charge, even though frivolous, for fear of committing another offense by denying the charge." *Grubka*, 858 F.2d at 1575. *Grubka* involves a federal employee who was accused of misconduct, denied the misconduct, gave an explanation of what happened, and was subsequently charged with making false statements during an agency investigation. The charge was dismissed by the court of appeals. *Id.* The facts in *Grubka* are analogous and nearly on point to the facts of the petition before the Court today.

preponderance of the evidence before an administrative judge with different rules of procedure and evidence than in a regular court.

The petitioner also fails to address the type of misstatement for which Respondent Kye stands accused. The false information she was charged with centered around the date upon which she regained control of her government issued Diner's Club card. Respondent admitted that if she did in fact tell her superior that she had control of and had destroyed the card on the date in question, she misspoke. Respondent tried to correct the misstatement during the course of the investigation. Under the theory set forth by the petitioner, an innocent misstatement by an employee upon being confronted with charges, regardless of subsequent efforts to assist in the investigation or correct the error, could result in termination of the employee. As previously stated, such potential for serious consequences would "chill" an employee's right to respond to charges (except by way of admitting to them), a right which is guaranteed by the United States Constitution and would further prevent them from correcting errors which later come to light through additional information for fear of a removal action. It is conceivable an employee, after learning of additional information, corrects a portion of an earlier statement only to find that his good-faith actions have lead to a charge of giving false statements and his removal.

The court of appeals in *Grubka* applied the term "plead[ing] not guilty" to the civil employee who denies

charges of misconduct brought against him or her by the government. *Grubka*, 858 F.2d at 1575; *See* n. 2 for quote. A criminal defendant who pleads not guilty cannot, based solely on the fact that she pleaded not guilty, be charged with making false statements when she is found guilty by a jury. To allow such "extra" charge would to effectively eliminate the protections of the Fifth Amendment against self-incrimination. The Court in *Grubka* held that requiring an employee to incriminate himself or herself by admitting to the alleged misconduct charged against him or her would require the court "[t]o hold that the rule violates the provisions of the Fifth Amendment to the Constitution against self-incrimination." *Grubka*, 858 F.2d at 1575. This Court has applied the Fifth Amendment self-incrimination protection to civil proceedings, *Id.*, and as such civil employees are afforded the same protection. Civil employees do not have the right to remain silent, as they can be charged with failure to assist in an investigation. However, federal employees have protection against self-incrimination, and requiring them to admit to misconduct or face additional charges is thus violative of the Constitution.

Petitioner cites *United States v. Dunnigan*, 507 U.S. 87 (1993) as precedent for upholding the government's right to charge the employee with both charges. Pet. Brief, p. 20. However, *Dunnigan* is a criminal case in which the defendant was found guilty of **perjury** and the sentencing guidelines provided an **increased sentence for the underlying offense** based on

finding the defendant guilty of perjury. *Dunnigan*, 507 at 96 (emphasis added).

Two things should be noted of *Dunnigan*. First, the court was not addressing the situation of an **additional, separate** charge being brought against the defendant for the false statements. The Court had before it the issue of whether or not a sentence for one offense could be increased based on a finding of perjury.

Second, *Dunnigan* addresses statements made under oath which were proven, beyond a reasonabledoubt, to be perjury.[4] While the sentencing guidelines which were at issue in *Dunnigan* apply also to statements made during investigations (Pet. Brief, p. 21, n. 6) the application of the guidelines to out of court statements is conditioned on being "materially false . . . that significantly obstruct or impede[] the official investigation or prosecution." *Id.*, citing Guidelines § 3C1.1 & Application Note 3(g). Even in petitioner's "supporting" case, the use of false statements as a basis for increasing the penalty for conviction of underlying misconduct is not without restraint. There has never been any assertion that the charged false statements by

---

[4]The Petitioner confuses the role of the sentencing phase of the trial and the proof phase on p. 21, n.6 of the Petition. The petitioner states that the burden of proof in the sentencing phase of the criminal case is preponderance-of-the-evidence. While this is true, the finding of perjury is within the criminal fact finding phase of the trial, which is under the beyond-a-reasonable-doubt standard.

Kye would rise to this level of impeding the investigation.

The petitioner misinterprets the court of appeals' holding that "an agency may not charge an employee with falsification or a similar charge on the ground of the employee's denial of another charge or of underlying facts relating to that other charge," as creating a "right to lie" for the employee. Pet. Brief, p. 13. Such an interpretation is unfounded, and in fact addressed by the court of appeals, which held, "[t]his does not mean, however, that an employee has a right to lie. . . " Pet. App. p. 17a. The court of appeals separates an employee's right to "deny the charges and the underlying facts" from making "false stories" or "telling tall tales." *Id.* Petitioner argues that the line between the two is indistinguishable. This line is no less distinguishable than the line created by the guidelines at issue in *Dunnigan, supra*. False stories and tall tales are material misrepresentations which significantly obstruct or impede an investigation. Such statements "go beyond denial and defense." *Id.* The concerns of the petitioner are addressed by the limitation that only denials of misconduct and the underlying facts are protected from further charges, not statements which go beyond denial and defense. The petitioner's contention that the ruling would give federal employees "substantial latitude to make false statements" is simply unfounded. Additionally, in the near ten years since *Grubka*, the problem of ambiguity of the right to deny alleged

misconduct has not once been an issue in the courts, and has been applied without incident. *See, Beverly v. United States Postal Service*, 136 F.2d 136 (1990) (A second charge for false statements based on a denial of charges dismissed as improper by the administrative judge in initial hearing, affirmed by court of appeals).

In the case of respondent Kye, the "false statements" of which Kye is accused did not materially nor significantly obstruct or impede the investigation. In fact, the statements by Respondent Kye did not obstruct the investigation into the unauthorized charges at all. The statements did not impede the investigators from gathering independent information about the charges and establishing where, when and how the charges were made. Respondent Kye stated that she had not made the credit card charges, and did not have the card in her control until April 2 or 3. This statement did not lead the agency investigation on any other avenues than those which it would have otherwise pursued: investigating when the charges were made; obtaining all information about the charges, including signatures, from the establishments at which the charges were made; determining what the charge amounts were. In fact, the agency was able to obtain signature information on one of the charges, which led to the Board sustaining one of the misconduct charges against Respondent Kye.

Petitioner further argues that to allow an employee to make false statements in the form of a

denial of charges is inconsistent with holding an employee responsible for making false statements about another employee in the course of an investigation. Pet. Brief, p. 13. However, in the case of an employee who makes false statements about another employee, the statements rise to a material level, and obstruct the investigation. If the employee points blame at an employee he or she knows to be innocent of the alleged misconduct or away from an employee he or she knows to have committed the misconduct, the investigation is impeded and obstructed away from the guilty employee.

The decision of the Board and the court of appeals is soundly based on precedent. The decision is based on sound Constitutional principles, as well as administrative procedure principles. No negative examples of the application of this rule have been cited since *Grubka* and there is no need for a change in the current state of the law. There are no unjustified constitutional restraints on the government when it is required to afford its employees the same rights protected by the constitution to other accused persons, whether in a criminal or civil context.

CONCLUSION

The respondent respectfully prays the petition for a writ of certiorari be denied.

Respectfully submitted.

NEIL C. BONNEY
Counsel of Record for Respondent Kye
NEIL BONNEY & ASSOCIATES, P.C.
Attorneys and Counsellors at Law
Haygood Office Buildings
4652-A Haygood Road
Virginia Beach, Virginia 23455
(757) 460-3477

APRIL 1997

No. 96-1395

In The

Supreme Court of the United States

October Term, 1996

JAMES B. KING, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

LESTER E. ERICKSON, JR., ET AL.,

Respondents.

JAMES B. KING, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

HARRY R. MCMANUS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

RESPONDENT LESTER E. ERICKSON'S BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

PAUL E. MARTH
Counsel for Respondent Lester E. Erickson
FORMAN, MARTH, BLACK & ANGLE, P.A.
235 N. Greene Street
P. O. Box 2020
Greensboro, NC 27402-2020
(910) 378-0172

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

ARE DUE PROCESS RIGHTS OF FEDERAL EMPLOYEES VIOLATED BY CHARGING THEM WITH FALSIFICATION BASED ON THEIR DENIAL OF ALLEGED MISCONDUCT?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

RESPONDENT LESTER E. ERICKSON'S BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Respondent Lester E. Erickson respectfully submits his response in opposition to Petitioner's Petition for a Writ of Certiorari.

OPINIONS BELOW

While Petitioner has correctly cited the salient opinions in this matter, it has omitted one denial of reconsideration, specifically: *Erickson v. Department of the Treasury and Office of Personnel Management*, Docket Number DA-0752-93-0295-R-1, *Order* (denying reconsideration) (Merit Systems Protection Board 3/24/95).

STATEMENT OF THE CASE

Lester Erickson, a Police Sergeant with the Bureau of Engraving and Printing, appealed his termination to the Merit Systems Protection Board on March 22, 1993. His notice of proposed removal contained two charges. Charge 1 was captioned: "Making False Statements in Matters of Official Interest" and concerned Mr. Erickson's response to an investigation on October 30, 1992.[1] Specifically, the agency was investigating the source of telephone calls to employees in which the caller would,

[1] Respondent Erickson's Appendix, 1a-2a.

without identifying himself, laugh madly into the telephone and hang up.[2]

The Agency distributed written questionnaires among members of the police unit, including Mr. Erickson.[3] To the question, "Approximate the number of occasions you made 'Mad Laugher' calls and to whom by name?" Mr. Erickson responded, "None." To the question, "Approximate time you quit participating in 'Mad Laugher' calls," Mr. Erickson responded, "I never participated." To the question, "Specifically, how many times did you ask your subordinates to cease the 'Mad Laugher' calls?" Mr. Erickson responded, "None, because I do not know who is doing it." Finally, to the question, "Are you willing to specifically state all those that are participants in the 'Mad Laugher' telephone calls?" Mr. Erickson's response was, "No – I do not know the true identification of the 'Mad Laugher.' In my opinion it is 95% of the police unit (and) also possibly personnel in Production."[4]

Page 14 of Petitioner's *Petition* argues that this last statement was more than a mere denial and was an affirmative misstatement. In fact, many employees were

---

[2] Respondent Erickson's Appendix, 3a-6a.

[3] Respondent Erickson's Appendix, 3a-6a.

[4] Petitioner's Appendix, 52a-53a.

found to have participated in the "Mad Laugher" incidents.[5] Respondent Erickson has included the Merit System Protection Board's *Initial Decision* to correct Petitioner's misstatement of fact.[6]

Based on the responses submitted by other members of the police unit, Mr. Erickson's superior, Carol Williamson, concluded that he had participated in the "Mad Laugher" caper and that his statements quoted above were false. She further concluded that his conduct violated Section 0.735-55 of the Department's Minimum Standards of Conduct. Such standards prohibit employees from uttering or writing false, misleading or ambiguous statements, deliberately or willfully, in connection with an official matter.[7]

In Charge 2, captioned, "Conduct Unbecoming a Supervisor," Mr. Erickson allegedly urged a co-employee to make a "Mad Laugher" call. Although the employee had not made the call, Mr. Erickson's conduct was found inappropriate and unacceptable.[8]

After the Administrative Law Judge upheld Mr. Erickson's removal, Mr. Erickson appealed to the Board. The Board denied his petition for review, but reopened the case on its own motion.[9]

---

[5] Respondent Erickson's Appendix, 4a-6a, 8a.

[6] Rules of the Supreme Court of the United States, Rule 15(2).

[7] Respondent Lester Erickson's Appendix, 3a.

[8] Respondent Lester Erickson's Appendix, 6a, 8a-9a.

[9] *Erickson v. Department of the Treasury*, 63 M.S.P.R. 80 (1994); Petitioner's Appendix, 50a.

The Board began its review with the proposition, stated in *Grubka v. Department of the Treasury*, 858 F.2d 1570, 1574-1575 (Fed. Cir. 1988), that an agency may not charge an employee with falsely denying misconduct when it separately charges him with the misconduct. Charge 1 was not sustained because its essence consisted of Mr. Erickson's failure to admit his participation in the conduct under investigation.[10]

The Board further found, however, that Mr. Erickson was never actually charged with the underlying conduct. Charge 1 was concerned with the veracity of his statements while Charge 2 dealt with his prompt to another employee to initiate a "Mad Laugher" call. Neither charge gave Mr. Erickson notice that he was charged with "Mad Laugher" calls. Consequently, the Board disregarded the agency's allegation that Mr. Erickson made the calls. The *Initial Decision*, sustaining Charge 1, was therefore reversed.[11]

The Board sustained Charge 2, but mitigated the penalty to a fifteen day suspension.[12]

Following the Merit System Protection Board's denial of reconsideration,[13] the Office of Personnel Management appealed to the Federal Circuit Court of Appeals. Several cases in which the Merit Systems Protection Board

---

[10] Petitioner's Appendix, 52a-53a.

[11] Petitioner's Appendix, 53a-54a.

[12] Petitioner's Appendix, 54a-55a.

[13] *Erickson v. Department of the Treasury and Office of Personnel Management*, Docket Number DA-0752-93-0295-R-1, *Order* (Merit Systems Protection Board 3/24/95).

resolved the same issue in favor of the employee were then consolidated for purposes of the appeal. The Federal Circuit, in *King v. Erickson*, 89 F.3d 1575 (Fed. Cir. 1996),[14] affirmed the Merit System Protection Board's decisions. Following denial of its petition for a hearing and suggestion for a rehearing *en banc*,[15] the Office of Personnel Management petitioned this Court for a writ of certiorari.

ARGUMENT

The considerations this Court applies in reviewing a petition for certiorari are as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari is granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.[16]

Recognizing that the Court has unlimited discretion in choosing to grant petitions for certiorari, Respondent

---

[14] Petitioner's Appendix, 1a-23a.

[15] Petitioner's Appendix, 108a-109a.

[16] Rules of the Supreme Court of the United States, Rule 10.

Erickson nevertheless contends there are no compelling reasons to grant Petitioner's petition, there is no question of federal law so important as to warrant Supreme Court scrutiny and the *King v. Erickson, supra* decision does not conflict with any decisions of this Court.

Petitioner has overlooked the precedential background behind *King v. Erickson* that appears in *Grubka v. Department of the Treasury*, 858 F.2d 1570 (Fed. Cir. 1988). *Grubka* involved four charges of employee misconduct, three for sexual harassment and one for prevarication. The Federal Circuit dismissed the first two charges because they were frivolous and there was no substantial evidence to support them. The Court dismissed the third charge because the administrative judge erroneously decided credibility and the incident was a private matter, unrelated to the official business concerns of the agency.

After reciting the fourth charge, alleging that Mr. Grubka made a false statement in a matter of official interest, the Court stated as follows:

> The AJ sustained this charge and in doing so found Grubka guilty of making a false statement in a matter of official interest in denying that he kissed Novak in the hotel stairwell by proving by Novak that he did kiss her. In other words, the AJ held by circuitous reasoning that proof by Novak that Grubka kissed her ipso facto proved that his denial was false and therefore, his denial was a separate offense as charged. We do not agree. This was indeed a novel theory. The effect of it is to hold that a denial of a charge itself becomes a separate proven offense if what is denied is proven to be true. We have found no case, and no case has

> been cited to us that approves such a theory. It has always been the rule and practice that a person charged with an offense can deny the charge and plead not guilty, either because he is not guilty or to force the charging party to prove the charge, and, regardless of the outcome, the denial is not itself a separate offense. Otherwise, a person could never defend himself against a charge, even though frivolous, for fear of committing another offense by denying the charge. The decision of the AJ denied Grubka his due process rights in that it denied him the right to a trial on the charge without due process of law . . . We hold that the charge has no substance, is frivolous and the decision of the AJ sustaining it is not supported by substantial evidence and is erroneous as a matter of law.[17]

The United States did not seek certiorari in *Grubka*.

King v. Erickson, supra did not deviate from the principle enunciated in *Grubka*, nor did it expand it. The *Erickson* decision begins with an analysis of the federal employment context. Cause is required for discharge of federal employees.[18] Specific due process procedures, before the imposition of adverse action, include thirty days' written notice of the reasons for the proposed action, a response time of seven days and a written decision accompanied by specific reasons for the action taken.[19] By virtue of 5 U.S.C. § 7513, federal employees possess a property right in their employment within the meaning of the Fifth Amendment to the United States

---

[17] *Grubka, supra*, at pgs. 1574-1575.

[18] *Id.*, at p. 1581; 5 U.S.C. § 7513(a).

[19] *Id.*, at p. 1581; 5 U.S.C. § 7513(b).

Constitution. *Id.*, at p. 1580. This right entitles federal employees to minimum due process procedures, which, pursuant to *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985) consist of notice and a meaningful opportunity to respond. The issue posed by *Erickson* and the companion cases is whether due process is threatened by charging employees with falsification after they deny incidents of misconduct. The Federal Circuit answered this question affirmatively, because in its view, a threatened falsification charge impedes an employee's meaningful opportunity to respond.[20]

The Office of Personnel Management argued that while federal employees could deny a charge, denial of the underlying facts permissibly formed the basis of a falsification charge. The Federal Circuit rejected this distinction. Under OPM's view, federal employees, unsophisticated in legal technicalities, must distinguish between legal statements of misconduct and the facts that underlie them. Fearing their denials would subject them to an additional falsification charge, employees would be reluctant to deny charges.[21]

The Federal Circuit correctly observed that in each case before it, the addition of the falsification charges had augmented the penalties to either removal or demotion. Federal employees, aware of the risk of a falsification charge, would feel coerced into admitting misconduct.

---

[20] *King v. Erickson, supra*, at p. 1581.

[21] *King v. Erickson, supra*, at p. 1583.

The circumstance of faulty memories or divergent perceptions would too readily transform credibility determinations into falsification charges. The consequent "chilling effect" on federal employees' right to respond would not comport with their due process rights.[22] While it is naturally easier for an agency to prove misconduct with the leverage of a threatened falsification charge, due process requires allowing an employee to deny both the charge and its underlying facts without risk of the falsification charge.[23] The Federal Circuit cautioned that a right of denial does not equate to a right to lie or affirmatively mislead an agency. Beyond denial of the specific facts forming the charge, the employee had no right to invent stories, or tamper with evidence. Engaging in such conduct provides the basis for a falsification charge.[24]

The Office of Personnel Management argued that the Fifth Amendment right against compulsory self-incrimination did not require a right of denial. The Federal Circuit responded that the right against self-incrimination had nothing to do with the procedural due process concerns arising out of *Grubka, supra*.[25]

Finally, the Office of Personnel Management argued that the Merit Systems Protection Board's decisions ran afoul of *United States v. Dunnigan*, 507 U.S. 87 (1993). In particular, OPM was referring to the decision in *Walsh v.*

---

[22] *Id.*, at p. 1583.

[23] *Id.*, at p. 1584.

[24] *King v. Erickson, supra*, at pgs. 1583-1584.

[25] *Id.*, at p. 1584.

Department of Veterans Affairs, 62 M.S.P.R. 586 (1994),[26] where the Board had declined to consider Ms. Walsh's denial of misconduct as justification for an enhanced penalty. The Board relied on *Walsh, supra* in deciding *Erickson v. Department of the Treasury*, 63 M.S.P.R. 80 (1994).[27]

Dunnigan, supra involved the constitutionality of a statute that enhanced a criminal sentence for a defendant's perjury at trial. This Court, in finding that the statute was not unconstitutional, held that a right to testify does not include a right to lie.[28] The *Erickson* Court concurred with this proposition. Similarly, it stated, federal employees have no right to lie or mislead. They simply have a right to deny the facts supporting the charges against them, and also the charges themselves. If charging an employee with falsification based upon his denial of misconduct is improper, then there is no justification to consider the denial for penalty enhancement purposes.[29]

Applying its holding to Mr. Erickson's facts, the Court found his denials of knowledge of or participation in the "Mad Laugher" pranks made up the basis of the falsification charges. His statements were not otherwise false. Consequently, the Merit Systems Protection Board

---

[26] Petitioner's Appendix, 41a-42a.

[27] Petitioner's Appendix, 55a.

[28] *Id.*, 507 U.S. at p. 96.

[29] *King v. Erickson, supra*, at pgs. 1584-1585.

had not erred in reversing the falsification charge against him.[30]

Petitioner's basic assumption in urging this petition is that the *Erickson* decision creates and sanctions a right to lie among federal employees. It says that the Federal Circuit's condemnation of affirmative misstatements is undermined by the alleged affirmative misstatements made in these cases. In particular, it cites Mr. Erickson's statement that "in my opinion it is 95% of the police unit [and] also possibly personnel in Production" who made the calls. As Respondent Erickson has shown above,[31] other employees participated in the "Mad Laugher" calls. Further, Mr. Erickson was not charged with falsification based on that statement alone but on all his denials of participation in the prank.[32] Contrary to Petitioner's argument, the facts in Mr. Erickson's case do not sanction a right to mislead.

Petitioner argues that the line between affirmative misstatements and denial is inherently unstable. Given the broad range of employment scenarios that occur, as shown by these cases alone, Petitioner may be correct. The question, however, is whether that circumstance corrupts the basic principle *King v. Erickson* seeks to protect, specifically, the employee's right to a meaningful response. Simply because an employing agency has to sift through statements and decide which ones are true

---

[30] *King v. Erickson, supra*, at p. 1585.

[31] Respondent Erickson's Appendix, 4a-6a, 8a.

[32] *Erickson v. Department of the Treasury*, 63 M.S.P.R. 80 (1994); Petitioner's Appendix, 52a-54a.

denials and which are affirmative misstatements does not justify the automatic addition of a falsification charge. As *Erickson* correctly observes, the employee has a property interest at stake that is entitled to constitutional protection.[33] Allowing an agency to threaten an employee with a falsification charge turns his due process entitlement into a sham.

Respondent agrees with Petitioner's assertion that there is no constitutional right to lie. None of the criminal cases it cites, however, are instructive on the issue of whether charging a federal employee with falsification based on his denial of facts is constitutional. In *Bryson v. United States*, 396 U.S. 64 (1969), the defendant appealed his conviction for filing a false affidavit in which he had denied communist party affiliation. The affidavit was compelled by a statute later declared unconstitutional. In upholding his conviction, this Court held that the unconstitutionality of the statute did not alter the fact that the defendant had lied.

In *Glickstein v. United States*, 222 U.S. 139 (1911), the issue was whether immunity from criminal prosecution in a bankruptcy statute protected the defendant's perjury at a creditors' hearing. The Court concluded Congress had not intended, within that statute, to give debtors a license to commit perjury during bankruptcy proceedings. In *United States v. Knox*, 396 U.S. 77 (1969), this Court considered the sufficiency of an indictment charging the defendant with falsifying information on a wager registration form. The defendant argued that completion

---

[33] *King v. Erickson, supra*, at pgs. 1580-1581.

of the form truthfully would incriminate him under existing state statutes. This Court held that the indictment was sufficient. Whether completion of the form was defensible on duress or compulsion grounds were factual questions for trial.

In *United States v. Apfelbaum*, 445 U.S. 115 (1980), the defendant was given immunity before testifying before a grand jury. He nevertheless committed perjury. This Court considered whether his truthful statements, given under the grant of immunity, and his false statements, were admissible as evidence during the perjury trial. Because the Court held that the Fifth Amendment, as it relates to self-incrimination, provides no protection for perjury, the entirety of his statements was admissible.

Finally, in *United States v. Havens*, 446 U.S. 620 (1980), this Court considered whether evidence suppressed because of an illegal search was usable for impeachment of defendant's testimony on cross-examination. While the defendant had a constitutional shield from evidence gathered improperly, that protection did not entitle him to commit perjury and the evidence was admissible once he did so.

All these cases resolve criminal issues involving self-incrimination and none address the due process concerns raised here. This case does not rest on the Fifth Amendment protection against self-incrimination. Rather, it reaffirms the opportunity to be heard protected by the due process clause of the Fifth Amendment. The cases cited by Petitioner in this regard are inapposite and the Federal Circuit correctly disregarded them in reaching its decision.

Finally, Petitioner again argues the application of *United States v. Dunnigan, supra*. *Dunnigan* addressed whether enhancement of a criminal sentence, resulting from defendant's perjury at trial, was proper. The statutory framework, including perjury as a penalty enhancement factor, does not exist here. *Dunnigan* did not create a right to enhance sentencing because of perjury; it merely said that Congress, when enacting the legislation, did not trample on a defendant's constitutional right to give testimony.

Respondent submits that the issue is not whether there is a constitutional right to lie, but whether *King v. Erickson* created or sanctioned such a right. Creation of such a right did not occur in *Erickson* and Petitioner has not cited any case approving or sanctioning such a right.

Petitioner claims that the rule enunciated in *Erickson* is "unprecedented." To the contrary, the rule first appeared in *Grubka v. Department of the Treasury*, 858 F.2d 1570 (Fed. Cir. 1988) and has been the law of that circuit for nearly a decade. (See *Beverly v. United States Postal Service*, 907 F.2d 136 (Fed. Cir. 1990) holding the administrative judge correctly decided that a second charge was a mere denial of the first charge and was not a valid separate offense.)

Since Petitioner cannot show how the government's abilities to manage the civil service were adversely affected in the past nine years, there are no compelling reasons to grant this petition. *Erickson* does not conflict with any decisions of this Court and the Federal Circuit's decision does not establish any new principle requiring review by this Court.

CONCLUSION

While this Court has unlimited discretion in deciding to grant a petition for writ of certiorari, Petitioner's petition does not meet this Court's rules for granting a writ. Petitioner argues that the *Erickson* decision has both created and sanctioned a "right to lie" among federal employees. The decision, however, scrupulously distinguished a "right to lie" from the right to deny misconduct. It impairs a federal employee's constitutional right to a meaningful response if such distinction is not recognized. The rule prohibiting a falsification charge, when a federal employee denies misconduct, has been the law of federal employment for nearly a decade. Petitioner fails to show how such rule has adversely affected management of the civil service.

In support of its argument that *Erickson* conflicts with this Court's decisions, Petitioner cites several criminal cases where a defendant was convicted of perjury or received an augmented sentence because of perjury. Respondent Erickson submits that the narrow issues in those cases are not applicable here. There is no conflict between *Erickson* and any of the decisions Petitioner has cited.

Petitioner argues that because the line between denial and affirmative misstatement is indefinite, the rule enunciated in *Grubka* and *Erickson* should be reversed. The difficulty an employing agency may encounter in separating denials from affirmative misstatements does not justify chilling an employee's right to respond by a threatened charge of falsification.

Accordingly, Respondent Erickson requests that this Court deny Petitioner's *Petition for a Writ of Certiorari*.

Respectfully submitted this 5th day of June, 1997.

PAUL E. MARTH
Counsel for Respondent
Lester E. Erickson
FORMAN, MARTH, BLACK
& ANGLE, P.A.
235 N. Greene Street
P. O. Box 2020
Greensboro, NC 27402-2020
(910) 378-0172

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

LESTER E. ERICKSON, Appellant, v. DEPARTMENT OF THE TREASURY, Agency.	DOCKET NUMBER DA-0752-93-0295-I-1 DATE: July 21, 1993

Lester E. Erickson, Walkertown, North Carolina, pro se.

Arlean Leland, Esquire, Washington, D.C., for the agency.

BEFORE

Sharon Fonsworth Jackson
Administrative Judge

INITIAL DECISION

Lester E. Erickson filed an appeal on March 22, 1993, from an action taken by the Department of the Treasury which removed him from his position of Supervisory Police Officer with the Bureau of Printing and Engraving (BEP), effective March 20, 1993. The Board has jurisdiction over the appeal pursuant to the provisions of 5 U.S.C. §§ 7511-7513.

Based on the following analysis and findings, the agency's action is AFFIRMED.[1]

---

[1] A hearing was originally scheduled on this appeal on May 26, 1993. *See* Appeal File, Vol. I, Tab 7. It was continued to June 10, 1993, at the agency's request. Prior to the scheduled

ANALYSIS AND FINDINGS

The agency based its decision to remove the appellant from his position on charges of (1) making false statements in matters of official interest, and (2) conduct unbecoming a supervisor. *See* Appeal File, Vol. I, Tab 8(41). The removal action will be sustained by the Board only if it is supported by a preponderance of the evidence. *See* 5 U.S.C. § 7701(c). A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. C.F.R. § 1201.56(c)(2)(1993).

The appellant made false statements in matters of official interest.

According to the notice of proposed removal, the appellant submitted a false statement to the agency on October 30, 1992, in connection with an official investigation of a complaint filed by Officer Hilton Moore. In an

---

hearing, the parties' representatives advised me that a settlement agreement had been reached and the hearing was cancelled. The appellant's representative subsequently advised me that the appellant had refused the agency's settlement offer and that he was withdrawing as the appellant's representative. *See* Appeal File, Vol. II, Tab 17. I ordered the appellant to advise me by June 24, 1993, whether he wanted to proceed with a hearing. I also advised the appellant that absent my receipt of his response by June 24, 1993, he would be deemed to have waived his hearing request and the appeal would be decided on the record. *Id.* In addition, I scheduled a conference call with the parties and set a close of record date. The appellant did not file a timely response to the order; therefore, the appeal is being decided on the basis of the parties' written submissions.

interview during that investigation, the appellant was asked specifically about his knowledge and/or participation in the "Mad Laugher" telephone calls.[2] *See* Appeal File Vol. I, Tab 8(41). The appellant provided a sworn statement in which he denied any knowledge of the "Mad Laugher," with the exception of a softball team by that name. He also stated, however, his belief that "95% of the Police Force Unit" had participated in the "Mad Laugher" telephone calls. *Id.* The agency asserted that sworn statements obtained from Officers Craig D. Straight and Erick Williams, Sergeant Danny W. Seyler, and Carol R. Wimpey, a BEP Contractor, substantiated that the appellant had knowledge of, and participated in, the "Mad Laugher" telephone calls. The agency contended that the appellant's failure to admit his knowledge of and participation in the "Mad Laugher" telephone calls during the investigation violated Section 0.735-5 of the agency's Minimum Standards of Conduct.[3]

In order to support its charge, the agency must establish that the appellant provided false information with the intention or [sic] defrauding or deceiving the agency.

---

[2] The record reflects that the "Mad Laugher" telephone calls refer to numerous telephone calls made to agency employees at their duty stations, during which the caller would engage in continuous laughter without giving his/her identification. *See* Appeal File, Tabs 8(4z), 8(4aa).

[3] The agency submitted a copy of Section 0.735-5 of the agency's Minimum Standards of Conduct. *See* Appeal File, Vol. I, Tab 8(4cc). That section prohibits agency employees from making false, misleading, or ambiguous statements, deliberately or willfully, whether oral or written, in connection with any official matter.

See Naekel v. Department of Transportation, 782 F.2d 975, 977 (Fed. Cir. 1986). In establishing an employee's intention to deceive or mislead the agency, circumstantial evidence may be considered. *Kumferman v. Department of the Navy*, 785 F.2d 285, 290 (Fed. Cir. 1986).

The agency provided a copy of the appellant's handwritten sworn statement dated October 30, 1992, in which the appellant answered specific written questions posed to him by Carol Williamson, Manager of the Security and Police Services Branch.[4] *See* Appeal file, Vol. I, Tab 8(4x). In his statement, the appellant responded to Williamson's written questions by indicating that his knowledge of the "Mad Laugher" was that it was the name of a softball team; that he had never made or participated in any "Mad Laugher" calls; that he had received several such calls himself; and that he did not know who was making the calls. The appellant stated he believed that 95% of the police unit and "possibly personnel in Production" were involved. *Id.* The appellant said that he had heard the lieutenant ask at least three times for the calls to cease; however, he had never asked his subordinates to cease the calls because he did not know who was making them. The appellant asserted that the "whole charade" was ridiculous and a waste of taxpayers' money. He further asserted his belief that the investigation stemmed from a plot to discredit him that had been orchestrated by Lieutenant Stout and Sergeant Seyler.

---

[4] Williamson also served as the investigator of Hilton's complaint concerning the "Mad Laugher" telephone calls.

The appellant's statement was written on a preprinted agency form entitled "Voluntary Statement," *Id.* The appellant, however, wrote on the form that he was giving it under duress and fear of losing his job. In a separate handwritten statement, also dated October 30, 1992, the appellant indicated that he had been ordered by Williamson to give the statements and was doing so "at her order as a condition of employment in view of possible job forfeiture." The appellant then complained specifically about his relationship with Stout and Seyler, and contended that the working conditions at the BEP were unbearable and discriminatory. The appellant asked that an investigation of his allegations be conducted.

The agency also provided sworn statements from Straight, Williams, Seyler, and Wimpey. *See* Appeal File, Vol. I, Tabs 8(4s), 8(4y), 8(4z), and 8(4aa). According to Straight's statement, he began receiving "Mad Laugher" calls shortly after he went on eight-hour evening shifts. He initially received the calls while he was on Posts 5 and 8, but then he began receiving them "all over the place," including the arms room where he picked up his weapon and radio, and the locker room. He deduced that the calls were being placed from the Command Center. He thought the calls were part of an "initiation because all of the officer's [sic] that have been at BEP long before [him] . . . were involved with it." Appeal File, Vol. I, Tabs 8(4aa). Straight stated:

> Once it became apparent that the Mad Laugher calls didn't bother me the calls became less frequent. Officer Midder would come around and ask me "have you recieved [sic] a call from the Mad Laugher yet". I have worked the front gate

> and recieved [sic] Mad Laugher calls and called the number printed on the telephone read-out window and Officer Midder would answer. Sgt. Erickson would come around during post inspections and would say "Be on the look out the Mad Laugher is out and about". [Spelling and punctuation as in original.]

Id.

Straight stated that when he subsequently learned, after talking to Stout, that the "Mad Laugher" calls were no longer a joke, he stopped participating in the calls. He said that Stout, who had received two "Mad Laugher" calls during roll call, had told everyone to "knock it off." Straight described subsequent pranks Midder and other officers engaged in that were related to the "Mad Laugher" telephone calls. He said that he had heard Midder tell the appellant about Officer Moore having received four calls and that the appellant just shook his head and walked away.

In his sworn statement, Williams gave his opinion that the appellant and Officer Stallings were participants in the "Mad Laugher" telephone calls. *See* Appeal File, Vol. I, Tab 4(4s). Williams clarified that it was "only a guess." Seyler asserted in his sworn statement that he began receiving "Mad Laugher" telephone calls on June 26, 1992. *See* Appeal File, Vol. I, Tab 8(4z). He said:

> The main one to call was Sgt Erickson as his N. Carolina accent can't be hidden and was very easy to recognize. Sgt Erickson called approximately 75 times into the command center while I was on duty he would watch me on camera and call while I was on post inspection. Then at times he would have some one relieve him and

> be where I was and mad laugher calls would still come in. [Punctuation as in original.]

Id. According to Seyler's statement, when the personnel, including the appellant, were rotated to other shifts, the calls on the swing shift "all but stopped."

Wimpey indicated in her statement that she began receiving "Mad Laugher" calls in her office after she began working on the second shift.[5] *See* Appeal File, Vol. I, Tab 8(4y). She described receiving calls under the following circumstances:

> Then when I would be at Post #8 about to enter the plant a few times the phone would ring and would be for me. The Officer at the Post would hand me the phone and the caller would laugh and hang up. I proceeded to the Command Center as I knew there was a camera at Post #8 and accused Sgt. Erickson of calling me. He stated that he did not call me. [Grammar and punctuation as in original.]

Id. Wimpey said that, after receiving a call one night in her office, she called the Command Center and the appellant answered. She said that she "laughed" at the appellant and then identified herself, explaining that she had done it because she thought the appellant had been calling her. She stated that the appellant again denied having called her. Wimpey asserted that the appellant approached her a few days later and asked her to call the

---

[5] In a subsequent affidavit, Wimpey stated that she is employed as a contract employee by the BEP and has worked as a Safety Specialist since April 1991. *See* Appeal File, Vol. II, Tab 24. She also confirmed that the statement she made during the investigation is truthful.

Command Center and laugh at Seyler. She said that she refused and told him that she was busy.

On appeal, the appellant did not specifically deny that he had participated in, or that he had knowledge of, the "Mad Laugher" calls; rather, he suggested that any misconduct on his part should be excused because he suffers from alcoholism.[6] He acknowledged that he had provided the sworn statement, but claimed that it had been given under duress. *See* Appeal File, Vol. I, Tab 2. He said that Williamson and Jesse Robinson, a police inspector, had called a meeting of the uniform police personnel on October 26, 1992, and informed them that they were launching an official "Mad Laugher" investigation; that the parties involved in the telephone calls would be fired; and that the officers were expected to cooperate in the investigation or action could be taken against them.

The appellant said that he was called into an interview with Williamson on October 30, 1992, and that he cooperated and answered the questions asked of him. He stated that Williamson subsequently called him a "liar"; that his request for counsel was denied; and that when he asked several times to leave the interview, Williamson refused his requests. The appellant stated:

> I felt I had been restrained against my will, and my job threaten [sic], and I was put under duress to answer questions to save my job.

Id.

---

[6] The appellant's claim that he is an alcoholic will be discussed more fully in connection with his affirmative defense of handicap discrimination.

The appellant said that he was subsequently allowed to go home; however, when he next reported for duty, he was placed on administrative leave.[7]

For the following reasons, I find that it is more likely true than not true that the appellant had knowledge of and participated in the "Mad Laugher" telephone calls and that his sworn statement denying any such involvement was false. Straight, Williams, Seyler, and Wimpey provided sworn statements expressing their belief that the appellant was a participant in the "Mad Laugher" telephone calls. Although Willliams said that he was just guessing. Straight, Seyler, and Wimpey provided logical explanations for their conclusions about the appellant's involvement. Moreover, Wimpey related a specific incident where the appellant solicited her participation in the calls. I find the statements from Straight and Wimpey to be particularly persuasive because they candidly admitted that they also had participated in the telephone calls. Although the appellant claimed, in the statement he gave Williamson, that Seyler was "out to get him," he offered no motive, and no such motive is apparent, for Straight or Wimpey to give false statements against him.

In his appeal, the appellant contended that because he was ordered by Williamson to provide the sworn statement and to answer her questions and he feared for his job, the statement could not be used against him. The Board, however, has held that an employee's failure to

---

[7] The appellant complained of the duty assignments he received subsequent to his providing the sworn statement; however, those complaints are not relevant to the charged misconduct.

cooperate in an agency investigation after being notified that the answers will not be used in a criminal prosecution is an actionable and serious offense. *See Kane v. Department of Veterans Affairs*, 46 M.S.P.R. 203, 209 (1990).

Attached to his appeal was a document, signed by the appellant, specifically stating that he had bee advised that his statements would not be used in a criminal prosecution against him. *See* Appeal File, Vol. I, Tab 2. The appellant, therefore, was obligated to cooperate in the investigation. He was free to refuse to answer questions and suffer the consequences of his actions, but once he chose to answer, the circumstances did not justify his failing to give truthful answers.

Based on my review of the evidence submitted by the agency and, in the absence of a specific denial by the appellant that the statement he provided the agency was false, I find that the agency has supported its first charge by preponderant evidence. The charge that the appellant made false statements in matters of official interest is sustained.

The appellant engaged in conduct unbecoming a supervisor.

The agency asserted that the appellant's solicitation of Wimpey to telephone the Command Center and direct "Mad Laugher" at Seyler was conduct unbecoming a supervisor. In the notice of proposed removal, Williamson stated:

> To solicit the participation of a BEP Contractor in making disruptive telephone calls to a BEP Police Officer at his duty post is inappropriate for any Bureau employee and is totally unacceptable on the part of a supervisor.

Appeal File, Vol. I, Tab 8(41). In support of the charge, the agency offered the sworn statement made by Wimpey and her subsequent affidavit affirming the truth of the statement.

For the reasons previously given, I find Wimpey's statement to be worthy of belief. The appellant has neither denied that he asked Wimpey to place a "Mad Laugher" call to Seyler while Seyler was on duty nor has he offered any reason why Wimpey would fabricate such an allegation against him. A supervisor is expected to conduct himself in a professional manner and, at a minimum, refrain from encouraging pranks which would impede the agency's mission. The appellant acknowledged in his sworn statement to the agency that he had been told that the calls had to stop. I, therefore, find that the appellant's solicitation of Wimpey to make a "Mad Laugher" telephone call to Seyler was conduct unbecoming a supervisor. Accordingly, the agency's second charge is sustained.

The appellant bears the burden of proof on his affirmative defense of handicap discrimination.

Notwithstanding my findings on the merits of the agency's charges, the agency's decision to remove the appellant cannot be sustained if the appellant shows that it was based on a prohibited personnel practice, such as discrimination based on a handicapping condition, as described in 5 U.S.C. § 2302(b)(1). *See* 5 U.S.C. § 7701(c)(2). The appellant alleged that he suffers from

the handicapping condition of alcoholism; that the agency was aware of his condition prior to his removal; and that the agency refused to accommodate his condition by giving him an opportunity to rehabilitate himself. The appellant bears the burden of proof on this affirmative defense. *See* 5 C.F.R. § 1201.56(c)(2) (1993).

The appellant has not established that the agency's action was based on his handicapping condition.

A Federal agency is required to make reasonable accommodation for the known physical or mental limitations of a "qualified individual with a handicap" unless the agency can show that the accommodation would pose a hardship on its operations. 29 C.F.R. § 1614.203(c) (1992).[8] To establish a prima facie case of discrimination on the basis of a handicapping condition, the appellant must (1) show that he is an individual with a handicap as defined at 29 C.F.R. § 1614.203 (1992)[9] and that the agency action appealed to the Board was based on his handicap; and (2) to the extent possible, articulate a "reasonable

[8] This provision corresponds to 29 C.F.R. § 1613.704 (1992). In October 1992, new regulations concerning discrimination went into effect. The regulations applicable to this appeal are found in 29 C.F.R. Part 1614 (1992).

[9] An "individual with handicap(s)" is defined as one who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment. 29 C.F.R. § 1614.203(a)(1) (1992). "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1614.203(a)(3) (1992).

accommodation" under which he believes he could perform the essential duties of his position or of a vacant position to which he could be reassigned. *See Savage v. Department of the Navy*, 36 M.S.P.R. 148, 152 (1988); *Stalkfleet v. United States Postal Service*, 6 M.S.P.R. 637, 647-48 (1981). Once the appellant has established a prima facie case, the agency has the burden of showing that the action was based on a legitimate, nondiscriminatory reason. This burden can be met by showing that the appellant is not a qualified individual with a handicap[10] or that reasonable accommodation of the appellant's handicap would impose an undue hardship on the agency's operations. *See Savage*, 36 M.S.P.R. 148, 153 (1988); *Stalkfleet*, 5 M.S.P.R. 637, 647-48 (1981).

Throughout the processing of this case, the appellant has asserted that he is an alcoholic. In his appeal, he stated:

> From November 11 thru November 27th 1992 I was admitted to Charter Hospital in Grapevine Texas suffering from alcoholism over this entire incident. My job was threaten, [sic] my marriage on the rocks and my elderly mother in North Carolina suffered a heart attack recently. This situation pushed me over the edge and I seeked professional help at Charter Hospital. [Grammar and punctuation as in original.]

[10] A "qualified individual with a handicap" is a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others. *See* 29 C.F.R. § 1614.203(a)(6) (1992).

Appeal File, Vol. I, Tab 2. The appellant said that after he completed his hospital stay, he advised the EEO officer, Ike Liggins, of his alcoholism and provided Liggins with a letter from his doctor. He asserted that, despite the recommendation in the doctor's note that he be returned to "normal duty," the agency gave him undesirable assignments which he believed would force him to relapse. He stated that, because of the undesirable assignments, he has "lost vacation time, [was] disallowed overtime, night shift pay, and Sunday premium pay and holiday pay." *Id.* The appellant said that he suffered a relapse on December 28, 1992, which resulted in his being hospitalized again at Charter Hospital until January 6, 1993.

The appellant said that he put his supervisor on notice of his condition when he returned to work on January 7, 1993. He also indicated that, after he received the notice of proposed removal on February 10, 1993, he notified the deciding official that he suffers from alcoholism and asked for an extension of time to complete his treatment program and to secure evidence of his physical condition. He acknowledged that he initially was granted an extension; however, when he asked for a further extension until April 1, 1993, his request was denied and the decision to remove him was made. The appellant asserted that he had provided the agency with all of the medical information he had available and he had taken steps to secure additional information; however, he had not received the documentation.

The appellant submitted a statement dated November 25, 1992, from S. Richard Roskos, M.D., of the Charter Hospital, which states:

> Lester Erickson has been under my care since Nov 11, 1992 and is scheduled to leave November 27th. He is released to return to work at full capacity, as of Nov 30, 1992. It would help his emotional state to return to normal duty. [Punctuation as in original.]

Appeal File, Vol. I, Tab 2; Vol. II, Tab 15. The appellant provided a copy of an "Interdisciplinary Treatment Plan" dated November 13, 1992, from Charter Hospital which gives a "nursing diagnosis" of "disuse syndrome" as manifested by the appellant's "long history of alcohol abuse." *Id.* The treatment plan recounts what the appellant had revealed about his alcohol abuse. He also provided a copy of his discharge summary, which indicated that he was given a prescription for the medication, "Zoloft". Finally, the appellant submitted a statement dated January 6, 1993, from Gary Malone, M.D., of the Charter Hospital, which states:

> Lester Erickson was admitted to our hospital on December 28, 1992. He has been participating in our inpatient program since that time. He is being discharged today and may return to work tomorrow, Thursday, January 7, 1993.

Id.

The agency argued that the appellant failed to provide sufficient evidence for it to assess his claim that he was handicapped by alcoholism. *See* Appeal File, Vol. II, Tab 25. The agency noted that neither of the doctor's statements give a diagnosis of alcoholism and that the treatment plan reveals no basis, other than the appellant's self-assessment, to support his claim that he suffers from alcoholism. The agency also noted that the discharge

summary contains no diagnosis of the appellant's condition and that the drug, Zoloft, which is referenced in the summary, is an anti-depressant which normally is not prescribed in the treatment of alcoholism.

The agency stated that it had given the appellant ample opportunity prior to his removal to provide evidence of his medical condition. The agency cited the letter from the deciding official to the appellant requesting that specific questions concerning his condition be answered by his doctor. *See* Appeal File, Vol. I, Tab 8(4h). The agency indicated that the only response it received was the appellant's answers to the questions, not the doctor's, which stated that his receipt of the requested information was "pending." *See* Appeal File, Vol. I, Tab 8(4e).

The agency argued that, based on the appellant's conduct and work performance, it had no reason to believe that his claim of alcoholism was valid absent some medical evidence. The agency noted that the appellant's work performance had been satisfactory or above and that his attendance had also been satisfactory. The agency submitted affidavits from Williamson, Stout, Wimpey, and Liggins, indicating that they had not observed any signs that the appellant had been under the influence of alcohol while he was at work. *See* Appeal File, Vol. II, Tab 23.

The agency also submitted an affidavit from John J. Griffith, a BEP Security Specialist. *Id.* Griffith stated that he and the appellant had been close friends since their days in Vietnam; that the appellant lived with him from December 1990 until August 1992; that he had observed

the appellant drink a few beers on about five occasions; and that he had seen him intoxicated only twice. Griffith said that he was surprised by the appellant's assertion that he is an alcoholic and asserted that, because of their close relationship, he would have known if the appellant had an alcohol abuse problem.

In *McCaffrey v. United States Postal Service*, 36 M.S.P.R. 224, 229 (1988), the Board held that in order for the appellant to establish that he suffers from the handicapping condition of substance abuse, he must provide evidence from himself concerning his pattern of substance abuse and its ill effects, and from medical or diagnostic experts that his pattern of substance abuse along with his other symptoms constitutes a handicapping condition. *See also Harris v. Department of the Army*, 57 M.S.P.R. 124, 128-29 (1993).

According to the treatment plan from Charter Hospital submitted by the appellant, he claimed that he had been drinking alcohol since he was 18 years old; that he had increased the frequency and amount of his alcohol intake to the point that he was drinking approximately 12 hours daily; and that he had tremors, blackouts, and nausea upon withdrawal. *See* Appeal File, Vol. II, Tab 15. In his appeal, the appellant repeatedly stated that he is an alcoholic, and that he has remained sober since December 29, 1992. The appellant, however, has not provided any expert medical evidence to confirm that he suffers from alcoholism. The doctor's statements do not contain a diagnosis; the treatment plan is based primarily on the appellant's representations; and the discharge summary, while referring to the appellant's need to remain sober, also does not contain a diagnosis of alcoholism.

Detracting from the appellant's claim of alcoholism are the affidavits of his co-workers, who asserted that they had never seen the appellant display any signs that he had been abusing alcohol. Griffith, who acknowledged a longstanding friendship with the appellant and with whom the appellant had lived for a significant period of time, said that he had not seen any evidence that the appellant regularly abused alcohol either at home or at work.

The record reflects that, prior to his removal, the appellant had requested additional medical evidence from Charter Hospital and his psychotherapist to establish that he suffers from alcohol abuse. *See* Appeal File, Vol. I, Tab 8(4e). The appellant, however, never provided the medical evidence to the agency nor has he provided it to the Board during the course of this appeal. Absent corroborating medical evidence and in light of the affidavits of the appellant's co-workers indicating that they had never observed anything to suggest that the appellant abused alcohol, I find that the record is insufficient to establish that the appellant is a handicapped person.

Assuming *arguendo* that the appellant had shown that he is a handicapped person, the evidence does not establish that the charged misconduct was a manifestation of the appellant's handicapping condition. The appellant has not claimed that he was under the influence of alcohol either when he provided the sworn statement to Williamson, concerning his knowledge and/or participation in the "Mad Laugher" calls, or when he asked Wimpey to make such a call to Seyler. According to

Willimason's description of her interview with the appellant on October 30, 1992, when he made the false statements, she observed nothing to indicate that the appellant was impaired. *See* Appeal File, Vol. II, Tab 23. Also, Wimpey said in her affidavit that she holds a bachelor's degree in Community Health, with a minor in Psychology; that she considers herself to be extremely observant; and that she had not perceived any signs of alcohol abuse by the appellant prior to his removal. I find that the appellant has failed to show that the agency action appealed to the Board was based on his handicap; therefore, this affirmative defense of handicap discrimination fails. *See Tate v. Department of Defense*, 57 M.S.P.R. 180, 189 (1993).

The penalty of removal is within the tolerable bounds of reasonableness and promotes the efficiency of the service.

An agency may take an action to remove an employee from his position only for such cause as will promote the efficiency of the service. 5 U.S.C. § 7513(a). The Board has held that an employee's failure to respond truthfully during an investigation into matters of official interest adversely affects the efficiency of the service. *See Kane v. Department of Veterans Affairs*, 46 M.S.P.R. 203, 209 (1990); *Ford v. Department of Defense*, 30 M.S.P.R. 43, 44-45 (1986). Also, a supervisor's solicitation of another employee to engage in misconduct similarly impacts on the efficiency of the service.

Nevertheless, before it can be concluded that a particular penalty promotes the efficiency of the service, it must appear that the penalty takes reasonable account of

all relevant mitigating factors in the particular case. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 303 (1981). The Board will review the agency-imposed penalty only to determine if the agency conscientiously considered all the relevant facts and exercised managerial discretion within tolerable limits of reasonableness. *Id.* at 306. In making such determinations, the Board gives due weight to the agency's primary discretion in exercising its managerial function of maintaining employee discipline and efficiency, recognizing that the Board's function is not to displace management's judgment, but to assure that managerial judgment has been properly exercised. *Id.*

Richard Laird, the deciding official, stated in his affidavit that prior to determining that removal was the appropriate penalty in this case, he investigated the appellant's claim that he had an alcohol problem and was unable to find any corroboration, either from the staff or the appellant's personnel records, for the appellant's claim. *See* Appeal File, Vol. II, Tab 23. He said that he considered the appellant's offenses to be extremely serious. He said that the appellant's "blatant dishonesty during an official investigation was totally unacceptable." He also stated that he felt the appellant's action set "an extremely poor example" for the employees that the appellant supervised. Laird said that, despite the appellant's good work record, he felt there was no reason to mitigate the proposed penalty of removal.

The appellant suggested that other employees who had been involved in the "Mad Laugher" calls had received nothing more serious than a two-week suspension for their misconduct and, therefore, the penalty of

removal in his case was too severe. *See* Appeal File, Tab 15. There is no evidence, however, that the employees identified by the appellant were supervisors, that they gave false statements to the agency, or that they solicited a contract employee to engage in misconduct. Consequently, any difference in the penalties assessed to these employees is not evidence that the appellant was disparately treated. *See Parker v. Department of the Navy*, 50 M.S.P.R. 343, 350 (1991).

The record reflects that the appellant had approximately two years and four months of service with the agency prior to his removal, and that his work performance and attendance was satisfactory. Nonetheless, the appellant's offenses are extremely serious and reflect poorly on his ability to responsibly perform the duties of a supervisor and law enforcement officer. *See Jones v. Department of the Army*, 52 M.S.P.R. 501, 506-507 (1992) (a security officer may be held to a high standard of conduct); *Jackson v. United States Postal Service*, 48 M.S.P.R. 472, 476 (1991) (the agency may hold a supervisor to a higher standard of conduct than non-supervisory employees). The record reflects that the deciding official conscientiously considered the relevant mitigating factors in this case. Based on my review of the record, I find that the penalty of removal does not exceed the tolerable bounds of reasonableness and, therefore, the agency's decision in this case must be accorded deference.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /s/ Sharon Fonsworth Jackson
Sharon Fonsworth Jackson
Administrative Judge

ORIGINAL

Docket No. 96-1395

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

-vs-

LESTER E. ERICKSON, JR., ET AL.

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

-vs-

HARRY R. MCMANUS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT JEANETTE M. WALSH'S REQUEST TO PROCEED IN FORMA PAUPERIS

JOHN R. KOCH
Counsel for Respondent Jeanette M. Walsh
REICHERT, WENNER, KOCH & PROVINZINO, P.A.
501 St. Germain
P.O. Box 1556
St. Cloud, MN 56302
(320) 252-7600

18 pp

Respondent Walsh by and through her counsel, John R. Koch, requests to proceed *in forma pauperis*. As grounds for this request, respondent Walsh states as follows:

1. Respondent Walsh has been directed by the Clerk of the United States Supreme Court to file a response to Petitioner's Petition for Writ of Certiorari.

2. Respondent has been advised that the cost of printing a response will be in the neighborhood of $1,000, and that any future briefing request will be even more expensive.

3. Respondent has prepared and files herewith a copy of her notarized Affidavit in the form prescribed by the Federal Rules of Appellate Proceeding set forth her financial circumstances.

4. Respondent has not sought or been granted leave to proceed *in forma pauperis* in any other court.

WHEREFORE, respondent requests an order of the court that she be granted leave to proceed *in forma pauperis*.

Respectfully submitted this 5 day of June, 1997.

REICHERT, WENNER, KOCH
& PROVINZINO, P.A.

John R. Koch
Attorney for Respondent Walsh
501 St. Germain
P.O. Box 1556
St. Cloud, MN 56302
(320) 252-7600
Atty. Reg. No. 57228

Jeanette M. Walsh, Pro Se

Docket No. 96-1395

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

-vs-

LESTER E. ERICKSON, JR., ET AL.

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

-vs-

HARRY R. MCMANUS, ET AL.

AFFIDAVIT IN FORMA PAUPERIS

STATE OF MINNESOTA)
)ss.
COUNTY OF STEARNS)

I, Jeanette Walsh, being first duly sworn, depose and say that I am one of the respondents in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security

therefore; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following: to file a brief in response to the director of the Office of Personnel Management's Petition for a Writ of Certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1. Are you employed?

   a. Department of Veteran's Affairs, net income of $1,529 per month.
   b. Not applicable.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

   a. No.

3. Do you own any cash or checking or savings accounts?

   a. Yes, three. A checking account with approximately $100.

4. Do you have any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   a. I own a home worth approximately $60,000 with an outstanding mortgage of $40,000. I do not own a car or any stocks, bonds, notes or other valuable property.

5. List the persons who are dependant upon you for support and state your relationship to those persons.

   a. No dependents.

I understand that a false statement or answer to any question in this affidavit will subject me to the penalties for perjury.

Jeanette Walsh

Jeanette Walsh

Subscribed and sworn to before me
this 5th day of June, 1997.

Patty J. Hanson

Notary Public

PATTY J. HANSON
NOTARY PUBLIC-MINNESOTA
My Commission Expires Jan. 31, 2000

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor and by filing briefs in accordance with Rule 33.2.

_____

REIC .RT, WENNER, KOCH & PROVIN JO
PROFESSIONAL ASSOCIATION
ATTORNEYS AT LAW

THOMAS R. WENNER
JOHN R. KOCH
JOHN C. PROVINZINO
ROBERT H. WENNER

EDWARD M. REICHERT, JR. (RETIRED)

501 ST. GERMAIN
P.O. BOX 1556
ST. CLOUD, MINNESOTA 56302
TELEPHONE - AREA CODE 320
252-7600 252-7601 252-7602
FAX: 320-252-2678

BRANCH OFFICE:
RICHMOND, MN 56368
597-3539

REPLY TO:
BOX 1556 - ST. CLOUD, MN
56302

June 5, 1997

William K. Suter
The Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Sent Via Overnight Mail

Re: James B. King, Office of Personnel Management
-vs- Lester E. Erickson, et al
No. 96-1395

Dear Mr. Suter:

Enclosed please find Respondent Jeanette M. Walsh's Request to Proceed In Forma Pauperis, Affidavit to Proceed In Forma Pauperis and Respondent Walsh's Brief in Opposition regarding the above matter.

Very truly yours,

REICHERT, WENNER, KOCH
& PROVINZINO

John R. Koch

JRK:klf
Enc.

STATE OF MINNESOTA)
)ss.
COUNTY OF STEARNS)

AFFIDAVIT OF SERVICE

Kristi L. Finken, of the City of Albany, County of Stearns, State of Minnesota, being duly sworn, says that on the 5th day of June, 1997, she served the annexed **Respondent Jeanette M. Walsh's Request to Proceed In Forma Pauperis and Respondent Walsh's Brief in Opposition** on the followin in this action:

Lorraine Lewis, Esq.
Office of General Counsel
Office of Personnel Management
Washington, DC 20415

Hannah B. Best
Counsel for Respondent Barrett and Roberts
1003 Luna Circle NW
Albuquerque, NM 87102

Mary Jennings
Deputy General Counsel
General Counsel Office
Merit Systems Protection Board
1120 Vermont Avenue, NW
Washington, DC 20419

Walter Dellinger, Esq.
Acting Solicitor General
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvanian Avenue, NW
Washington, DC 20530-0001
(Sent via overnight mail)

Neil C. Bonney, Esq.
Counsel for Respondent Kye
Neil Bonney & Associates, P.C.
4652-A Haygood Road
Virginia Beach, VA 23455

Paul E. Marth
Counsel for Respondent Erickson
Forman, Marth, Black & Angle, P.A.
235 Nortn Green Street
P.O. Box 2020
Greensboro, NC 27402-2020

by mailing to them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing same in the post office at St. Cloud, Minnesota directed to said party at the last known address of said party.

Kristi L. Finken

Subscribed and sworn to before me
this 5th day of June, 1997.

Notary Public

RENITA E. ROHLOFF
NOTARY PUBLIC-MINNESOTA
My Commission Expires Jan. 31, 2000

Docket No. 96-1395

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

-vs-

LESTER E. ERICKSON, JR., ET AL.

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

-vs-

HARRY R. MCMANUS, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT WALSH'S BRIEF IN OPPOSITION

Jeanette Walsh Pro Se
John R. Koch - #57228
Counsel for Respondent Jeanette Walsh
REICHERT, WENNER, KOCH
& PROVINZINO, P.A.
501 St. Germain
P.O. Box 1556
St. Cloud, MN 56302
(320) 252-7600

QUESTION PRESENTED

Whether the Due Process Clause precludes a federal agency from sanctioning an employee for making false statements when the employee denies engaging in employment-related misconduct.

STATEMENT REQUIRED BY RULE 29.6

The Petitioner has correctly listed the parties to the proceeding. There is no corporation which is a party to this proceeding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Regulations

No. 96-1395

In the

Supreme Court of the United States

October Term, 1996

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

-vs-

LESTER E. ERICKSON, JR., ET AL.

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

-vs-

HARRY R. MCMANUS, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT WALSH'S BRIEF IN OPPOSITION

Pursuant to Rule 15 of the Court's rules, Respondent Jeanette Walsh respectfully files this brief in opposition to the Office of Personnel Management's Petition for Writ of Certiorari.

OPINIONS BELOW AND NOTICE THAT JURISDICTION OF THIS COURT IS CORRECTLY PRESENTED BY PETITIONER

The decision of the United States Court of Appeals for the Federal Circuit is reported as *King v. Erickson*, 89 F3d 1575 (Fed. Cir. 1996). App., 1a-23a. The decision of the Merit Systems Protection Board is *Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586 (1994). App., 29A-49A. Jurisdiction is correctly presented by petitioner.

STATEMENT OF THE CASE

The Department of Veteran Affairs employed respondent Jeannette Walsh as a Social Services Assistant at the agency medical center in St. Cloud, Minnesota. The agency removed her for engaging in a sexual relationship with a patient, engaging in improper financial dealings, and providing false statements to the agency regarding her relationship with the patient. Walsh challenged the dismissal and an administrative judge found that the agency had failed to prove any of the charges. In this decision, the administrative judge premised his findings on prior inconsistent statements made by the patient.

The agency petitioned the Merit Systems Protection Board for review. The MSPB reversed the administrative judge's finding that the agency had failed to prove a sexual relationship with the patient while he was an inpatient. The MSPB focused on inconsistent statements made by Walsh and relied on the presumption that once a

witness' statement has been discredited, the rest of the statement may be disregarded or discounted unless there is a reasoned explanation. On the falsification issue, the MSPB followed *Grubka v. Department of the Treasury*, 858 F2d 1570 (Fed. Cir. 1988), that an agency may not charge an employee both with misconduct and with making false statements regarding the misconduct. The MSPB interpreted *Grubka* as giving an employee the due process right to be heard on a charge without having falsification automatically sustained whenever the holding on the related misconduct charges are sustained. App., 4a, 40a. The MSPB mitigated Walsh's penalty to a 90-day suspension. App., 42a. The Federal Circuit affirmed the decision. App., 2a.

ARGUMENTS FOR DENYING THE PETITION

Before the government can deprive one of its employees of a protected property interest in employment based on an allegation of misconduct, the employee is entitled to basic rights of due process which include notice and an opportunity to be heard on the charges. 5 U.S.C. § 7513(b) (1994); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985). At earlier stages of this proceeding, the government conceded that due process also included the right of the employee to defend against the charges by denying the charges. The government also conceded that an employee, when faced with misconduct charges, may respond with a legal conclusion that she did not commit the misconduct underlying the charges, but it argued that an employee may not deny the misconduct itself without subjecting herself

to a separate charge of falsification. The Federal Circuit rejected this distinction:

> A denial of underlying facts is in effect a denial of the charge that they support. Allowing an agency to charge an employee with falsely denying facts underlying a misconduct charge would deprive the employee of a *meaningful* opportunity to respond to the charges.

App., 16a.

The rule that has existed in the federal system for almost a decade is expressed in *Grubka*, 858 F.2d at 1575:

> It has always been the rule and practice that a person charged with an offense can deny the charge and plead not guilty, either because he is not guilty or to force the charging party to prove the charge, and regardless of the outcome, the denial is not itself a separate offense.

The government's brief argues that denials of facts are "affirmative misleading", "falsehoods", "false statements", "right to lie" and so forth. The Federal Circuit answered this question by holding that an employee may not falsify facts or tell "tall tales" or go beyond denial and defense in staking out a position. In this respect, the factual circumstances of *Walsh v. Department of Veterans Affairs* are particularly appropriate. Ms. Walsh was charged with having a sexual relationship with a man while he was an inpatient at the agency's medical center and with falsification for denying the charge. She *admitted* that she had had an intimate relationship with the man *after* his discharge from the center and at later times, but denied that she had had a relationship during the time he was an inpatient. App., 36a-37a. The administrative judge found that the agency had failed to prove the underlying charges,

basing this finding on the charging patient's questionable credibility as determined from several prior inconsistent statements, an alcoholic background, a delay of 2½ years in coming forward, and a potential personal benefit to fabricate the story of an inpatient relationship. In reversing these findings, the MSPB shifted the focus to inconsistent statements made by Walsh and resorted to evidentiary presumptions on credibility. App., 32a. The Federal Circuit was mindful of these concerns, noting that "memories are often faulty" and that "responses to questions may not always be accurate."

> To render such statements constituting denials as actionable falsehoods might too readily transfer credibility determinations into separate charges of falsification.

App., 17A.

The government relies heavily on *United States v. Dunnigan*, 507 U.S. 87 (1993), in which this Court held that Sentencing Guideline § 3C1.1, which calls for an enhancement of a defendant's sentence if the defendant commits perjury at trial, does not undermine the constitutional right to testify. Although additional charges for falsification may increase the sanction in the present case, the analogy here is more apparent than real. The constitutional issue in *Dunnigan* was the right to testify, not the due process right to deny charges without fear of additional charges for "false denials" if the matter is decided adversely. In *Dunnigan* there was perjury at the trial, and the matter of the underlying guilt was determined beyond a reasonable doubt.

Id., at 96. Unlike *Walsh* in which there were close credibility questions, in *Dunnigan* it was undisputed that perjury was committed "[g]iven the numerous witnesses who contradicted respondent regarding so many facts on which she could not have been mistaken . . ." *Id.*, at 95-96. Further, the district court made specific findings of an obstruction of justice encompassing all of the factual predicates defining perjury. Significantly, the very language of Sentencing Guideline § 3C1.1 was for willfully impeding or obstructing the administration of justice during the prosecution of the crime. No suggestion was ever made that Walsh's simple denials constituted an obstruction of justice.

Ms. Walsh was asked by Veterans Administration investigators on two occasions whether she had had an improper sexual relationship with a patient of the medical center. These questions were tantamount to charges of major misconduct. Ms. Walsh responded "no" to each of these charges although she admitted that she became sexually intimate with the patient after his discharge from the facility. She did not make up a false story or tell "tall tales." She did not deceive, affirmatively mislead, impede, obstruct or do anything other than preserve her right to a meaningful hearing. In any verbal interchange, there are many shades of meaning.[1] Employees may be uncertain whether conduct constitutes misconduct, yet they may be coerced

---

[1]The MSPB found that Walsh had an intimate relationship with the patient while he was an *outpatient*, and used for proof of the outpatient status that the patient had missed several appointments at the medical center. App., 36a-37a.

into admitting the misconduct, whether they believe they are guilty or not, in order to avoid the more severe penalty of removal resulting from a falsification charge. App, 17a-18a. If employees cannot in effect deny the charge, either because they are not guilty or to force the agency to prove the charge, the effect of the due process right to notice and a right to hearing is considerably diminished.

The rule established by *Grubka* for the federal system has been in operation for eight years and has worked adequately. There is no need for Supreme Court review of this question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

REICHERT, WENNER, KOCH
& PROVINZINO, P.A.

John R. Koch - #57228
Attorney for Respondent Walsh
501 St. Germain
P.O. Box 1556
St. Cloud, MN 56302
(320) 252-7600

Jeanette Walsh, Pro Se

No. 96-1395

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

LESTER E. ERICKSON, JR., ET AL.

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

HARRY R. MCMANUS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
SETH P. WAXMAN
Deputy Solicitor General
ROY W. MCLEESE III
Assistant to the Solicitor General
DAVID M. COHEN
TODD M. HUGHES
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

LORRAINE LEWIS
General Counsel
STEVEN E. ABOW
JOSEPH E. MCCANN
ANA A. MAZZI
Attorneys
Office of General Counsel
Office of Personnel Management
Washington, D.C. 20415

QUESTION PRESENTED

Whether the Due Process Clause precludes a federal agency from sanctioning an employee for making false statements to the agency regarding allegations that the employee had engaged in employment-related misconduct.

TABLE OF CONTENTS

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued:

Constitution, statutes and regulations:

Statutes and regulations—Continued:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1395

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

LESTER E. ERICKSON, JR., ET AL.

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

HARRY R. MCMANUS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the court of appeals in *King* v. *Erickson* (Pet. App. 1a-23a) is reported at 89 F.3d 1575. The decision of the court of appeals in *King* v. *McManus* (Pet. App. 24a-28a) is unpublished, but the decision is noted at 92 F.3d 1208 (Table). The decision of the Merit Systems Protection Board (MSPB) in *Walsh* v. *Department of Veterans Affairs* (Pet. App. 29a-49a) is reported at 62 M.S.P.R. 586. The decision of the MSPB in *Erickson* v. *Department of the*

Treasury (Pet. App. 50a-58a), is reported at 63 M.S.P.R. 80. The decision of the MSPB in *Kye* v. *Defense Logistics Agency* (Pet. App. 59a-69a) is reported at 64 M.S.P.R. 570. The decision of the MSPB in *Barrett* v. *Department of the Interior* (Pet. App. 70a-96a) is reported at 65 M.S.P.R. 186. The decision of the MSPB in *McManus* v. *Department of Justice* (Pet. App. 97a-105a) is reported at 66 M.S.P.R. 564.

JURISDICTION

The judgment of the court of appeals in *King* v. *Erickson* was entered on July 16, 1996. Pet. App. 1a. The judgment of the court of appeals in *King* v. *McManus* was entered on July 22, 1996. Pet. App. 24a. Petitions for rehearing in both cases were denied on November 4, 1996. Pet. App. 106a-109a. On January 27, 1997, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including March 4, 1997. The petition for a writ of certiorari was filed on March 4, 1997, and was granted on June 27, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment provides: "nor [shall any person] be deprived of life, liberty, or property, without due process of law."

STATEMENT

These two cases arise from disciplinary proceedings against six federal employees. All six were disciplined or removed by their employing agencies for committing employment-related misconduct and for making false statements to their agencies about their misconduct. Pursuant to the Civil Service Re-

form Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, each employee appealed to the Merit Systems Protection Board (MSPB). The MSPB sustained one or more underlying charges of misconduct as to each employee, but refused to permit any of the employees to be disciplined for making false statements. In light of that refusal, the MSPB also reduced the sanction imposed upon each employee. Petitioner King, the Director of the Office of Personnel Management, appealed the MSPB's decisions to the United States Court of Appeals for the Federal Circuit, which affirmed.

1. a. *Walsh.* Respondent Jeanette Walsh worked as a Social Services Assistant at a medical center operated by the Department of Veterans Affairs in St. Cloud, Minnesota. Pet. App. 2a. The medical center received information that Walsh had engaged in sexual relations with a patient and had committed other misconduct. *Id.* at 33a. In statements to her supervisor and to agency investigators, Walsh acknowledged having had a sexual relationship with the patient for approximately 18 months, but claimed that the relationship did not begin until November 1988, after the patient had been discharged from the medical center. *Id.* at 31a-32a.

After completing an investigation, the medical center notified Walsh that it proposed to remove her for engaging in sexual relations with a patient, committing other misconduct, and making false statements to her supervisor and to agency investigators about her misconduct. Walsh Initial Decision 2-4 (No. CH-0752-92-0021-I-1) (MSPB Feb. 7, 1992). The agency subsequently removed her, and Walsh appealed to the MSPB. Proceedings before the MSPB were initially conducted before an administrative

judge. See 5 U.S.C. 7701(b)(1). In an affidavit submitted during these proceedings, Walsh stated that she had had sexual relations with the patient only three or four times, during the summer of 1989. Pet. App. 31a-32a. Notwithstanding Walsh's conflicting statements regarding her relationship with the patient, the administrative judge initially found that none of the charges against Walsh had been proven. *Id.* at 30a.

The Department of Veterans Affairs petitioned the MSPB for review of the administrative judge's decision. See 5 U.S.C. 7701(e)(1)(A). The MSPB reversed in part, finding that "while employed as a social services assistant, [Walsh] engaged in sexual relations with an alcohol-dependent patient at the agency medical center." Pet. App. 41a. The MSPB further concluded that Walsh's misconduct "was intentional and continued for some 18 months." *Id.* at 42a.

Although it therefore sustained the underlying charge of misconduct, the MSPB refused to sustain the falsification charge. Pet. App. 38a-41a. The MSPB did not dispute that Walsh had made false statements to her supervisor and to agency investigators regarding her sexual relationship with the patient. Rather, relying on a new reading of the Federal Circuit's decision in *Grubka* v. *Department of the Treasury*, 858 F.2d 1570, 1574-1575 (1988), the MSPB held that an agency may not "separately charge an employee with misconduct and making false statements or a similar offense regarding the alleged misconduct." Pet. App. 41a. That result was necessary, in the MSPB's view, to protect the employee's "due process right to have an opportunity to be heard on a charge, and not to have a falsification type charge automatically sustained by virtue of the sustaining of

an underlying charge." *Id.* at 40a. For the same reason, the MSPB held that Walsh's false statements could not be considered in determining the appropriate penalty to be imposed on Walsh for the underlying charge of misconduct that the MSPB had sustained. *Id.* at 42a. In light of its reversal of the falsification charge, the MSPB substituted a 90-day suspension for the penalty of removal that the agency had imposed. *Ibid.*

Chairman Erdreich filed a concurring opinion. Pet. App. 45a-49a. In his view, the conclusion that "an employee may give an untrue denial statement in response to an agency investigation * * * without the possibility of discipline for that statement * * * seems to conflict with several mandates that require a federal employee to be truthful in dealings with his federal employer." *Id.* at 45a. That leads to the "anomalous result that an employee may be required to respond to an agency inquiry, but may not be required to respond truthfully." *Id.* at 46a. It also "give[s] federal employees a privilege not accorded to ordinary citizens who 'may decline to answer the question, or answer it honestly, but [who] cannot with impunity knowingly and willfully answer with a falsehood.'" *Id.* at 46a-47a (quoting *Bryson* v. *United States*, 396 U.S. 64, 72 (1969)). Expressing his "concerns about how this decision * * * affects the standards of employee conduct basic to the ethical underpinnings of our federal civil service," Chairman Erdreich nonetheless concurred on the ground that *Grubka* and a later Federal Circuit decision compelled that result. *Id.* at 49a.

b. *Erickson.* Respondent Lester Erickson, Jr., was employed as a Supervisory Police Officer with the Bureau of Engraving and Printing. Pet. App. 5a.

That agency had been suffering from a series of "Mad Laugher" harassing telephone calls, in which someone anonymously called agency employees during work hours, laughed continuously, and then hung up. *Id.* at 52a. During a subsequent agency investigation, Erickson was interviewed and gave a sworn statement. *Ibid.* In his statement, Erickson claimed that he "never participated" in "Mad Laugher" calls; that he "d[id] not know who" was making the calls; and that he "d[id] not know the true identification of the 'Mad Laugher.'" *Id.* at 5a-6a. Erickson added that "[i]n my opinion it is 95% of the police unit [and] also possibly personnel in Production." *Id.* at 6a.

Because its investigation indicated that Erickson had been involved in making "Mad Laugher" calls, the agency notified Erickson that it proposed to remove him. Erickson Initial Decision 2-3 (No. DA-0752-93-0295-I-1) (MSPB July 21, 1993). The agency specifically charged Erickson with (1) making a false statement in a matter of official interest and (2) having encouraged an employee of an agency contractor to make a "Mad Laugher" call to an agency police officer. Pet. App. 52a-53a.

When the agency subsequently removed him, Erickson appealed to the MSPB. An administrative judge initially upheld Erickson's removal. Pet. App. 50a. On review, the MSPB upheld the charge that Erickson had encouraged someone to make a "Mad Laugher" phone call. *Id.* at 51a. Based on its decision in *Walsh*, however, the MSPB reversed the false statement charge and reduced the sanction of removal to a 15-day suspension. *Id.* at 52a-55a.

c. *Kye.* Respondent Sharon Kye was employed as a Supervisory General Supply Specialist for the Defense Logistics Agency. Pet. App. 59a. The agency

became aware that unauthorized use was being made of a Diners Club card that had been issued to Kye. Kye Initial Decision 1-2 (No. PH-0752-93-0524-I-1) (MSPB Nov. 12, 1993). Specifically, the card was used on a number of occasions during March 1993 to make improper cash withdrawals from ATM machines amounting to more than $2,000. *Id.* at 2. In addition, the card was used for the rental of a motel room on March 31, 1993. *Id.* at 9. Kye was not authorized to use the card at all during that period, because she was not on official travel. *Id.* at 2.

When agency investigators questioned Kye about the matter, she repeatedly maintained that she had not herself used the card for any of the improper charges. In addition, she told an agency investigator on one occasion that she had lost possession of the card while it was being misused, but that she had torn it up as soon as she regained possession of it, on April 2 or 3, 1993. Kye Initial Decision 4-5. At a later interview, she stated that she did not have possession of the card in early April 1993, but that she had in fact torn it up during the middle of April. *Id.* at 5-6. In fact, other evidence showed that she had possessed the card on March 31, when she used it at a motel. *Id.* at 9.

The agency subsequently gave Kye notice that it proposed to remove her, charging her, *inter alia*, with (1) failing to safeguard the Diners Club card, (2) failing to report its loss, theft, or compromise, (3) misuse of the card, and (4) providing false information in an official investigation. Kye Initial Decision 2-3. After her removal, Kye appealed to the MSPB. An administrative judge initially sustained Kye's removal on these grounds. Pet. App. 59a-60a. The MSPB sustained the charges of misconduct but re-

versed the false statement charge, relying on its decision in *Walsh*. *Id.* at 60a-63a. The MSPB accordingly reduced the sanction of removal to a 45-day suspension. *Id.* at 63a-64a.

d. *Barrett and Roberts.* Respondents Michael Barrett and Jerome Roberts were employed as Soil Scientists by the Department of the Interior. Pet. App. 9a. The agency received information that they, along with other employees, had worked during duty hours to build a fish pond at their supervisor's home. *Id.* at 71a. During the agency's investigation of the matter, Barrett and Roberts were asked about the incident. *Id.* at 86a. In response, "Roberts stated * * * that he did not remember anything about the building of the fish pond, while Barrett stated that he only worked on the fish pond on his own time." *Ibid.*

The agency subsequently notified Barrett and Roberts that it proposed to remove them, charging them with (1) misrepresentation or concealment of a material fact in connection with an investigation, (2) failure to report fraud, waste, and abuse, and (3) making false claims on time and attendance reports. Barrett and Roberts Initial Decision 2-3 (No. DE07529010226) (MSPB June 14, 1990). The agency subsequently decided, however, not to remove Barrett and Roberts, but rather to suspend them for 30 days and demote them. Pet. App. 71a.

Barrett and Roberts appealed to the MSPB. An administrative judge sustained the charges and proposed discipline against Barrett and Roberts. Barrett and Roberts Initial Decision 1-2; Remand Initial Decision 2 (No. DE0752900226B1) (MSPB Nov. 17, 1992). Barrett and Roberts sought review by the MSPB, which sustained the charge of making false claims on time and attendance reports, but reversed

the charge of misrepresentation during the investigation, relying on its decision in *Walsh*. Pet. App. 85a-87a.

The MSPB also reversed the charge of failure to report an act of fraud. Pet. App. 87a. In the MSPB's view, for Barrett and Roberts to have disclosed the fraud "would have necessitated implicating themselves in the misconduct of filing a false time and attendance report." *Ibid.* The MSPB concluded that "[a] charge based on such a requirement of self-implication is contrary to * * * *Walsh*." *Ibid.* Accordingly, the MSPB substituted letters of reprimand for the demotions and 30-day suspensions the agency had imposed on Barrett and Roberts. *Id.* at 88a-89a.

e. *McManus.* Respondent Harry McManus was employed as a Supervisory Correctional Officer with the Department of Justice. Pet. App. 98a. After a female correctional officer complained to the agency that McManus had made various sexual comments to her, the agency interviewed McManus. *Id.* at 25a-26a. During an initial interview, McManus denied having told the female officer that he was disappointed she had not called one evening when they were on duty together; he denied having stated that "he would have [the female officer] relieved so that she could come over to [McManus's post] and tease him more"; he "flatly denied discussing the subject of preferred sexual positions" with the female officer; and he "denied that he told [the female officer] that he had a bulge (in his pants) while talking with her." *Ibid.* In a later interview, however, he admitted that he had made some of those statements, and that he might have made all of them. *Ibid.*

The agency demoted McManus to the position of correctional officer, on the grounds that he had made sexual comments to a subordinate and that he had made false statements during an investigation. Pet. App. 25a. After he was demoted, McManus appealed to the MSPB. An administrative judge affirmed the findings of misconduct, but reduced the penalty to a 14-day suspension. *Id.* at 98a-99a.

McManus sought review by the MSPB, which affirmed the administrative judge's findings that McManus had engaged in misconduct, but reversed the false statement charge, relying on its decision in *Walsh*. Pet. App. 99a-103a. The MSPB then considered what penalty was appropriate, a question which it viewed as turning in significant part on whether the female officer had specifically discouraged McManus's remarks. The officer had said that, although she initially participated in the sex-related joking, she later told McManus to leave her alone. McManus, on the other hand, denied this. *Id.* at 101a. The agency argued before the MSPB that, when it was deciding this credibility issue, the MSPB should consider the fact that McManus initially had falsely denied having made any sexual comments at all to the officer. *Id.* at 100a.

The MSPB, however, categorically "decline[d] to consider [McManus's] false statement in analyzing the penalty issue"—even for such impeachment purposes. Pet. App. 100a. The MSPB therefore concluded that the female officer was a willing participant as to at least some of the remarks, and accordingly sustained the substitution of a 14-day suspension for the demotion the agency had imposed. *Id.* at 101a-103a.

2. In its decision in *Erickson*, the court of appeals considered appeals from the MSPB's decisions regarding Erickson, Walsh, Barrett and Roberts, and Kye. Pet. App. 1a-23a. Relying on "procedural due process concerns," the court held "that an agency may not charge an employee with falsification or a similar charge on the ground of the employee's denial of another charge or of underlying facts relating to that other charge." *Id.* at 20a-21a.

The court initially noted "that the government employees here had a protected property interest in their employment," and that they were therefore entitled both under applicable statutes and under the Due Process Clause to notice and a meaningful opportunity to be heard before adverse action was taken against them. Pet. App. 10a-11a (citing 5 U.S.C. 7513(b)). The court agreed with the MSPB that its earlier decision in *Grubka* was correctly interpreted to hold "that an employee's denial of the factual basis of a [misconduct] charge may not be used as the basis for a falsification charge." *Id.* at 15a.

The court also rejected the suggestion that there should be a distinction between denying an allegation of misconduct and denying the facts underlying the allegation. In the court's view, "[a]llowing an agency to charge an employee with falsely denying facts underlying a misconduct charge would deprive the employee of a *meaningful* opportunity to respond to the charges." Pet. App. 16a. The court reached this conclusion, it explained, because "employees might be reluctant to deny charges for fear that their denials would be construed as denials of facts, which in [the Office of Personnel Management's] view would subject them to an additional falsification charge." *Ibid.* The court also stated that if falsification charges

were permitted in this context, employees could be "coerced into admitting the misconduct, whether they believe that they are guilty or not, in order to avoid the more severe penalty of removal possibly resulting from a falsification charge." *Id.* at 16a-17a. In the court's view, that "would create a 'chilling effect' on their clear right to defend themselves, a 'Catch-22' situation for employees that is inconsistent with the due process right provided by federal law to enable them to defend themselves." *Id.* at 17a.

The court stated that its holding "d[id] not mean * * * that an employee has a right to lie or affirmatively mislead an agency engaged in an investigation." Pet. App. 17a. Rather, the court explained, "[b]eyond a denial of a charge or of the factual accusations supporting a charge, an employee may not make up a false story, or tell 'tall tales' in order to defend against a charge." *Ibid.* The court also indicated that falsification charges are permissible with respect to false statements made "when the agency is in an investigatory mode, prior to charges having being brought" and "when investigations are conducted concerning the conduct of other employees." *Id.* at 18a.

Applying the above principles, the court of appeals affirmed the MSPB's decisions in each of the cases. Walsh's statements, the court held, were "mere denials of having an intimate relationship with the patient" and were therefore insufficient to support a false statement charge. Pet. App. 22a. Similarly, Erickson's statements denying knowledge of or participation in the "Mad Laugher" calls "were denials of having engaged in such conduct" and "were thus not otherwise false." *Ibid.* Kye's denials of having misused the credit card and her other statements "in effect were * * * denials and were not actionable false statements." *Id.* at 23a. Finally, Barrett's and Roberts' statements that "they knew nothing of the events in question" were not actionable because they were "in essence * * * denial[s] and w[ere] not otherwise false." *Ibid.*

3. Six days after its decision in *Erickson*, the Federal Circuit decided *McManus* in an unpublished opinion. The court relied on its decision in *Erickson* to hold that McManus's denials of having made sexual comments to the female officer "were within the range of denials that must be permitted in order to make meaningful the right to respond to charges." Pet. App. 28a. Accordingly, the court concluded that "the [MSPB] did not err in reversing the falsification charge against McManus." *Ibid.*

SUMMARY OF ARGUMENT

Before the federal government may deprive one of its tenured employees of a protected property interest in continued employment based on allegations of misconduct, the employee must ordinarily be given notice and an opportunity to be heard. The employee's right to be heard, however, does not include the right to make false statements with impunity during the investigation or administrative resolution of allegations of misconduct.

The court of appeals' contrary ruling confers upon federal employees suspected of misconduct an expansive right to lie. Although the court of appeals attempted to characterize its ruling as limited, the breadth of its ruling is demonstrated by its disposition of the falsification charges in these cases. Those charges involve many different false statements, given in a wide variety of circumstances, yet

the court of appeals held that none of the six respondent employees could be disciplined or removed for having made false statements.

Whatever its breadth, the right created by the court of appeals is contrary to this Court's consistent holding that the Constitution contains no right to lie, and that those who choose to answer questions falsely may be made to suffer adverse consequences. In particular, the court of appeals' ruling cannot be reconciled with this Court's decision in *United States* v. *Dunnigan*, 507 U.S. 87 (1993). In *Dunnigan*, this Court held that judges may constitutionally enhance a defendant's sentence under the Sentencing Guidelines on the ground that the defendant committed perjury at trial. *Dunnigan*'s holding that the right to testify does not include the right to testify falsely without fear of adverse consequence contradicts the court of appeals' holding in these cases that employees' right to be heard *does* include the right to make false statements with impunity. *Dunnigan* also demonstrates that the court of appeals was mistaken when it held that "one can hardly justify enhancing a misconduct penalty because of * * * falsification." Pet. App. 21a.

Procedural due process principles provide no support for the right created by the court of appeals. Although the court of appeals apparently thought otherwise, all of the falsification charges in these cases involve statements made during agency investigations, at a time when employees do not have a procedural due process right to be heard, much less to make false statements.

More generally, when considering what procedures the Due Process Clause requires before the government may deprive individuals of their liberty or

property interests, this Court balances three factors: the private interest at stake; the risk of erroneous deprivations of that interest created by the procedures used, and the probable value of additional procedural safeguards; and the government's interest. See, *e.g.*, *Gilbert* v. *Homar*, 117 S. Ct. 1807, 1812 (1997). Although federal employees have a significant interest in retaining their jobs, the remaining two factors tilt decidedly against the conclusion that the Due Process Clause requires that tenured federal employees be given a right to make false statements about their misconduct.

First, there is little or no risk that discipline or removal of employees for making false statements will result in erroneous deprivations. In particular, there is no basis for the court of appeals' concern that innocent federal employees will falsely admit to misconduct in order to avoid the possibility that they might be disciplined or removed for making false statements. In *United States* v. *Grayson*, 438 U.S. 41, 54-55 (1978), this Court rejected a similar concern as "entirely frivolous." Conversely, granting federal employees the right to make false statements during agency investigations and administrative proceedings would undermine the Due Process Clause's central concern with avoiding inaccurate decisions.

In any event, the court of appeals' ruling is inconsistent with compelling government interests. First, it would gravely impede federal agencies' ability to accurately investigate allegations of employee misconduct. Second, it would seriously interfere with the authority of federal agencies to determine when to discipline or remove employees who have lied about their misconduct. Such interference would undermine the government's "compelling interest in main-

taining an honest police force and civil service." *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 808 (1977).

The ruling of the court of appeals would also draw into question the constitutionality of other important disciplinary systems. First, the constitutional right recognized by the court of appeals would seemingly apply not only to federal employees, but also to the many employees of state and local governments who have a protected property interest in their employment. Thus, the court of appeals' ruling leads to the conclusion that the Constitution prohibits state and local governments from disciplining or removing their employees for lying about alleged misconduct. Such a rule would be a substantial and entirely unwarranted federal intrusion into the employment relationship between state and local governments and their employees. Second, the system of attorney discipline is similar in important respects to the system of federal employee discipline. Left undisturbed, the ruling of the court of appeals arguably would imply that attorneys have a right to lie during attorney discipline investigations and proceedings.

The Due Process Clause does not entitle federal employees to lie to their employing agencies about their misconduct. The dubious benefit of such a rule would be far outweighed by its unacceptable consequences.

ARGUMENT

THE DUE PROCESS CLAUSE DOES NOT PROHIBIT FEDERAL AGENCIES FROM SANCTIONING EMPLOYEES FOR MAKING FALSE STATEMENTS ABOUT THEIR INVOLVEMENT IN EMPLOYMENT-RELATED MISCONDUCT

The issue in this case is whether the Due Process Clause entitles federal employees to make false statements to their employing agencies during the investigation or administrative resolution of allegations of employee misconduct. Contrary to the holding of the court of appeals, the Due Process Clause creates no such right.

A. The Holding Of The Court Of Appeals Creates A Broad Constitutional Right To Lie For Federal Employees Suspected Of Employment-Related Misconduct

The federal government has nearly three million civilian employees. U.S. Office of Personnel Management, Statistical Analysis and Services Division, *Federal Civilian Workforce Statistics* 14 (March 1997). As a result, federal agencies are often called upon to investigate and resolve allegations of employee misconduct.

Federal agencies follow varying procedures as they internally investigate such allegations. If such an investigation leads an agency to conclude that an employee has committed misconduct justifying discipline or removal, however, the agency generally must follow the procedures outlined in Chapter 75 of the CSRA, 5 U.S.C. 7501 *et seq.* As to many federal

employees, including the respondent employees,[1] the CSRA provides that an adverse action may be taken against an employee only "for such cause as will promote the efficiency of the service." 5 U.S.C. 7503(a), 7513(a). Moreover, the CSRA generally requires the agency to (1) give the employee advance written notice of the proposed adverse action, specifying the reasons for the proposed action; (2) allow the employee a reasonable time to respond; (3) permit the employee to be represented by counsel or other representative; and (4) provide the employee with a written decision with statement of reasons. See 5 U.S.C. 7503, 7513. Cf. *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 538-548 (1985) (employees with property interest in public employment have due process right to notice and opportunity to be heard prior to termination).[2]

If a federal agency takes a "major" adverse action, the employee may generally appeal to the MSPB. 5 U.S.C. 7503, 7512, 7513(d); *United States* v. *Fausto*,

[1] The CSRA excludes certain employees from the procedures established in Chapter 75. See 5 U.S.C. 7501, 7511. It also establishes somewhat different procedures applicable to certain specific categories of employees. See, *e.g.*, 5 U.S.C. 7541 *et seq.* (procedures applicable to adverse actions against employees appointed to the Senior Executive Service).

[2] In contrast to the procedural requirements applicable once an agency seeks to discipline or remove an employee, neither the Constitution nor the CSRA provides employees with the right to participate in their employing agencies' initial investigations. See *SEC* v. *Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742 (1984) (Due Process Clause is not implicated by agency investigations that do not adjudicate legal rights) (citing *Hannah* v. *Larche*, 363 U.S. 420 (1960)); see also 5 U.S.C. 7503, 7513 (employee's procedural rights under CSRA are triggered by agency's notice of proposed adverse action against employee).

484 U.S. 439, 446-447 (1988). When such appeals are brought, proceedings are typically conducted in the first instance before an administrative judge. 5 U.S.C. 7701(b)(1); 5 C.F.R. 1201.41 (1997). Full discovery is available during such proceedings, 5 C.F.R. 1201.71-1201.75 (1997), and the administrative judge may order an evidentiary hearing at which sworn testimony is taken, 5 C.F.R. 1201.41(b) (1997).[3]

During the investigatory and administrative stages of these proceedings, agencies typically require employees suspected of misconduct to make one or more statements about the allegations of misconduct. See pp. 31-33, *infra*. The holding of the court of appeals in these cases is that the Due Process Clause prohibits agencies from disciplining or removing employees for responding by making false statements. As the court put it, "an agency may not charge an employee with falsification or a similar charge on the ground of the employee's denial of another charge or the underlying facts relating to that other charge." Pet. App. 21a. In addition, the court held, such false statements may not even be considered in determining the penalty to apply to the underlying misconduct. *Ibid.*

Those holdings create an expansive right to lie for federal employees suspected of employment-related misconduct. The breadth of the right created by the court of appeals is demonstrated by the fact that the court reversed all of the falsification charges against all six respondent employees, even though the many

[3] The administrative judge's ruling as to the appropriateness of the adverse action is subject to review by the MSPB, 5 U.S.C. 7701(e)(1)(A), and the ruling of the MSPB is reviewable on appeal to the Federal Circuit, 28 U.S.C. 1295(a)(9).

different false statements at issue were made in a wide variety of circumstances. Pet. App. 22a-23a, 28a.

This broad disposition casts considerable doubt on the court of appeals' efforts to characterize its ruling as limited. The first asserted limit was that the right to make a false denial did not amount to a right to "make up a false story, or tell 'tall tales.'" Pet. App. 17a. The line between false denials of the factual basis of charges and "false stories" or "tall tales" is anything but readily apparent.[4] Moreover, the court gave directly conflicting signals about where it would draw that line. On one hand, the court recited, in *dicta*, examples suggesting that it might narrowly define the right to make a false denial. *Id.* at 17a-18a (falsification charge could properly be brought if employee gave false statement about employee's location at time of alleged misconduct, or about how employee came into possession of allegedly stolen government property). On the other hand, the court reversed charges based on false statements essentially indistinguishable from those discussed in the examples. *Id.* at 22a-23a (reversing falsification

[4] The proposed distinction between false denials and false stories is analogous to a distinction some courts of appeals have tried to draw when applying the so-called "exculpatory no" doctrine. That doctrine precludes the application of the federal criminal false statement statute, 18 U.S.C. 1001, to mere exculpatory denials of wrongdoing. Those courts of appeals that adhere to the doctrine have struggled unsuccessfully to develop a workable distinction between "mere denials" and other false statements. See, *e.g.*, *United States* v. *Wiener*, 96 F.3d 35 (rejecting doctrine in part for this reason), supplemented on other grounds, 104 F.3d 350 (2d Cir. 1996), cert. granted *sub nom. Brogan* v. *United States*, 117 S. Ct. 2430 (1997). In *Brogan* (No. 96-1579), this Court will consider the validity of the doctrine.

charge against respondent Kye, who made false statements about when she possessed government property); *id.* at 9a, 23a, 86a (reversing falsification charge against respondent Barrett, who made false statements about whether he was at work at given time, and when he performed work on supervisor's fish pond).[5]

The second limit the court identified was that "when the agency is in an investigatory mode, prior to charges having been brought, the agency is entitled to truth-telling by its employees." Pet. App. 18a. It is difficult to understand what the court meant by this asserted limitation, however, because all of the falsification charges in the present cases relate to false statements made in the course of agency investigations, and all of those false statements were made *before* the agency notified the respondent employee, pursuant to 5 U.S.C. 7513(b)(1), of its intention to take adverse action on the basis of his or her misconduct. See Pet. App. 5a (respondent Erickson), 9a (respondents Barrett and Roberts), 25a (respondent McManus), 31a-32a (respondent Walsh); Kye Initial Decision 4-6.

[5] The subsequent decisions of the MSPB reflect the conflicting signals sent by the court of appeals. Compare *Jefferson* v. *United States Postal Service*, 73 M.S.P.R. 376, 383 (1997) (without analyzing particular false statement at issue, MSPB states flatly that "An employee's denial of a charge or its underlying misconduct cannot be used in determining the reasonableness of a penalty."), with *Kirkpatrick* v. *United States Postal Service*, 74 M.S.P.R. 583, 586-587 (1997) (sustaining falsification charge because employee's "false story went beyond a mere denial and attempted to create a cover story to hide his involvement").

The third limit the court identified was that "when agency investigations are conducted concerning the conduct of other employees, false statements are actionable." Pet. App. 18a. Many agency investigations, however, involve allegations that more than one employee has engaged in misconduct. That was true, for example, in the case involving respondents Barrett and Roberts. Although their false statements related not only to their own misconduct but also to that of their supervisor, *id.* at 9a, the court nevertheless reversed the falsification charges against them, *id.* at 23a. Apparently, the court's view is that federal employees are obliged to tell the truth during an agency investigation only when they are not among those suspected of involvement in the misconduct being investigated.

B. This Court Has Consistently Rejected Claims That The Constitution Confers A Right To Lie

Whatever its breadth, the court of appeals' ruling is contrary to this Court's consistent holding that the Constitution contains no right to lie, and that those who choose to answer questions falsely may be made to suffer adverse consequences.

Most recently, the Court held in *United States* v. *Dunnigan*, 507 U.S. 87 (1993), that judges may constitutionally enhance a defendant's sentence under the Sentencing Guidelines on the ground that the defendant committed perjury at trial. See *id.* at 96 ("[The] right to testify does not include a right to commit perjury."). Accord *United States* v. *Grayson*, 438 U.S. 41, 52 (1978) (reaching same conclusion prior to enactment of Sentencing Guidelines).

The right to testify is rooted in the same due process principles that provide tenured federal employees with a right to be heard before they are removed. See *Rock* v. *Arkansas*, 483 U.S. 44, 51 & n.9 (1987). *Dunnigan*'s holding that the right to testify does not include a right to commit perjury plainly contradicts the Federal Circuit's holding that the right to a meaningful opportunity to be heard *does* include the right to make false statements. Moreover, the specific holding of *Dunnigan* that a defendant's sentence may be enhanced for false testimony is irreconcilable with the Federal Circuit's conclusion that "one can hardly justify enhancing a misconduct penalty because of * * * falsification." Pet. App. 21a.[6]

[6] The court of appeals sought to distinguish *Dunnigan* on the ground that *Dunnigan* "only dealt with enhancement of a sentence in a criminal context, where there is a heavier burden of proof than agencies have in proving charges of falsification against employees." Pet. App. 21a That account is wrong. The burden of proof in the federal criminal *sentencing* context is ordinarily precisely the same preponderance-of-the-evidence standard that applied to the charges of falsification in these cases. See *United States* v. *Watts*, 117 S. Ct. 633, 637 (1997) (per curiam) (citing Sentencing Guidelines § 6A1.3 comment.).

The court of appeals also stated that "the crime of perjury consists of lying under oath, a much more serious offense than violation of 5 C.F.R. § 5.4 [which requires federal employees to cooperate with investigations and to testify truthfully], thereby justifying a penalty beyond that levied on the basic offense." Pet. App. 21a. The Guidelines provision at issue in *Dunnigan*, however, applies not only to perjury at trial, but also to unsworn false statements that obstruct an investigation. See Guidelines § 3C1.1 & Application Note 3(g). Conversely, the right to lie created by the Federal Circuit applies not only to unsworn statements made by employees, but also to sworn ones, as is demonstrated by the fact that some of the false statements in these cases were sworn. See, *e.g.*, Pet. App. 52a. In any event, whether sworn or not, the false statements made by the respondent employees were of a kind punishable under the

In many other contexts, this Court has rejected claims that the Constitution protects individuals from the consequences of their false statements. Witnesses who testify falsely before the grand jury may be prosecuted for perjury, even if their testimony was compelled by grant of immunity from prosecution, *United States* v. *Apfelbaum*, 445 U.S. 115, 123-132 (1980); *Glickstein* v. *United States*, 222 U.S. 139, 141-142 (1911), or even if they claim not to have understood their Fifth Amendment privilege against self-incrimination, *United States* v. *Wong*, 431 U.S. 174, 177-180 (1977); *United States* v. *Mandujano*, 425 U.S. 564, 576 (1976) (opinion of Burger, C.J.). Similarly, those who submit false statements to the government may be criminally prosecuted, even if the statements are provided in connection with an allegedly unconstitutional statutory scheme, *Kay* v. *United States*, 303 U.S. 1, 6-7 (1938); *United States* v. *Kapp*, 302 U.S. 214, 217-218 (1937), and even in the face of a claim that the government unlawfully compelled the statements at issue, *United States* v. *Knox*, 396 U.S. 77, 79-84 (1969); *Bryson* v. *United States*, 396 U.S. 64, 67-73 (1969). Finally, the Court has rejected arguments by criminal defendants that the Sixth Amendment right to counsel or the exclusionary rule protects them from adverse consequences arising from their efforts to testify falsely. See *Nix* v. *Whiteside*, 475 U.S. 157, 173-174 (1986) ("For defense counsel to take steps to persuade a criminal defendant to testify truthfully, or

---

criminal law. See 18 U.S.C. 1001 (criminal false statement statute); 18 U.S.C. 1621 (criminal perjury statute). Thus, even if the gravity of the false statement were relevant to the analysis, that factor would be no basis upon which these cases could be distinguished from *Dunnigan*.

to withdraw, deprives the defendant of neither his right to counsel nor the right to testify truthfully."); *United States* v. *Havens*, 446 U.S. 620, 624-628 (1980) (exclusionary rule does not protect criminal defendants from impeachment at trial with prior inconsistent statements obtained in violation of Fourth Amendment or requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966)).

In sum, this Court's "cases have consistently—indeed without exception—allowed sanctions for false statements or perjury; they have done so even in instances where the perjurer complained that the Government exceeded its constitutional powers in making the inquiry." *Mandujano*, 425 U.S. at 577 (opinion of Burger, C. J.). The decision of the court of appeals in the present cases cannot be reconciled with this Court's unbroken, and unambiguous, precedent.

C. The Due Process Clause Does Not Support the Ruling Below

The court of appeals held that disciplining or removing the respondent employees on the basis of their false statements would offend procedural due process. This holding is clearly incorrect. The Due Process Clause does not compel the federal government to grant its employees immunity from employment-related sanction for making false statements in connection with agency investigations into their misconduct.

Although the court of appeals apparently thought otherwise, all of the falsification charges at issue in these cases involve statements made by the respondent employees during agency investigations, *before* they had been given notice that their agencies proposed to discipline or remove them. See p. 21, *supra*.

Due process is not implicated by such agency investigations, because they "adjudicate[] no legal rights," and therefore do not deprive individuals of any liberty or property interest. *SEC* v. *Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742 (1984) (SEC's use of subpoenas during investigation does not implicate Due Process Clause) (citing *Hannah* v. *Larche*, 363 U.S. 420, 440-443 (1960) (witnesses called before investigatory body have no due process rights to be informed of specific charges being investigated, to be informed of identity of complainants, or to cross-examine other witnesses)). Given that the respondent employees had no procedural due process right to be heard during the agencies' investigations, it is difficult to understand the court of appeals' conclusion that they did have a procedural due process right to make false statements at that time without fear of employment sanction. The court of appeals certainly identified no legal support for such a conclusion.[7]

In any event, the Due Process Clause does not provide federal employees with the right to make false statements to their employer at any time. The Due Process Clause provides tenured public employees with the right to notice and an opportunity to be

[7] In fact, although the court of appeals characterized its ruling as being rooted in principles of procedural due process, the court's ruling in effect creates a substantive right for federal employees to make false statements about their misconduct without fear of employment sanction. This Court's cases (see pp. 22-25, *supra*), however, foreclose any suggestion that such a right is "so deeply rooted in our history and tradition, or so fundamental to our concept of ordered liberty" as to be protected by the substantive component of the Due Process Clause. *Washington* v. *Glucksberg*, 117 S. Ct. 2258, 2271 (1997).

heard prior to their removal.[8] See *Loudermill*, 470 U.S. at 538-546. It also provides such employees with the right to "a more comprehensive post-termination hearing." *Gilbert* v. *Homar*, 117 S. Ct. 1807, 1811 (1997). The procedural protections provided by the CSRA are more than adequate to meet these requirements. See 5 U.S.C. 7503, 7513 (providing employees with right to notice and opportunity to be heard prior to imposition of discipline); 5 U.S.C. 7513(d), 7701, and 28 U.S.C. 1295(a)(9) (providing for administrative and judicial review of major adverse actions against employees).

Nothing in *Loudermill* or in any other case decided by this Court even remotely suggests that a public employee's due process right to an opportunity to be heard before being removed for misconduct includes a right to lie to his or her employer about the alleged misconduct. To the contrary, well-settled principles of due process law compel the conclusion that no such right exists.

[8] The Due Process Clause provides this protection to those public employees who have a constitutionally protected property interest in their continued employment. *Gilbert* v. *Homar*, 117 S. Ct. 1807, 1811 (1997). Many federal employees have such an interest. See *ibid.* (public employees who can be discharged only for cause have property interest in continued employment); 5 U.S.C. 7501(1), 7503(a), 7511, 7513(a) (specifying federal employees who may be disciplined or removed only for cause).

This Court has not yet decided whether "the protections of the Due Process Clause extend to discipline of tenured public employees short of termination." *Homar*, 117 S. Ct. at 1811. Cf. *id.* at 1812-1814 (tenured public employee charged with felony did not have right under Due Process Clause to hearing prior to suspension without pay).

When considering what procedures the Due Process Clause requires before the government may deprive individuals of their property or liberty interests, this Court balances three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest.

Homar, 117 S. Ct. at 1812 (quoting *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976)). Although federal employees who are faced with possible removal have a significant interest in the outcome of agency disciplinary proceedings,[9] see *Loudermill*, 470 U.S. at 543, the two remaining factors tilt decidedly against a conclusion that the Due Process Clause requires that tenured federal employees be given a right to make false statements about their employment-related misconduct. The dubious benefit of such a rule would be far outweighed by its obviously unacceptable consequences.

[9] When discipline short of removal is proposed, the employee's interest may be significantly reduced, and, in fact, the requirements of the Due Process Clause may not even be implicated. See *Homar*, 117 S. Ct. at 1811, 1813.

1. The discipline or removal of federal employees for making false statements about their employment-related misconduct does not create a risk that they will be erroneously deprived of their property interest in continued federal employment

The court of appeals' holding rested heavily on the concern that employees might otherwise "be coerced into admitting the misconduct, whether they believe that they are guilty or not, in order to avoid the more severe penalty of removal possibly resulting from a falsification charge." Pet. App. 16a-17a. This concern is unwarranted.

Prior to the rulings in these cases, the MSPB for years had been sustaining discipline or removal of employees for making false statements during agency investigations into employee misconduct, see pp. 37-38, *infra*, and there had been no indication that this practice was causing innocent employees to falsely admit that they engaged in misconduct. Cf. *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) (noting that criminal defendants are "unlikely to be driven to false self-condemnation"). To the contrary, the many reported cases in which employees falsely deny misconduct suggest that the problem, if there is one, is insufficient deterrence of false denials, not undue chilling of true ones.[10]

[10] The court of appeals' concern that agency discipline for false statements might have a chilling effect on employees' exercise of their right to be heard was exaggerated in part because the court of appeals incorrectly assumed that such discipline is automatic. Pet. App. 4a. Separate charges of falsification are not always brought when an agency believes an employee has falsely denied misconduct. See, *e.g.*, *DeWitt* v. *Department of the Navy*, 747 F.2d 1442, 1443-1446 (Fed. Cir.

In comparable circumstances, this Court has firmly rejected assertions that imposing sanctions on those who make false statements will deter innocent persons from exercising their right to be heard. For example, in *Grayson*, *supra*, this Court considered the claim that criminal defendants' right to testify would be chilled if judges could take into account at sentencing their belief that the defendant testified falsely at trial. The Court dismissed that claim, pointing out that any chilling effect on false testimony would be "entirely permissible," and that the assertion that truthful testimony would be inhibited was "entirely frivolous." 438 U.S. at 54-55.

2. *Permitting federal employees to lie would be contrary to compelling governmental interests*

Even if disciplining or removing employees for making false statements did have some chilling effect on employees' exercise of their right to be heard, the Due Process Clause would not prohibit such discipline or removal. As this Court explained in *Dunnigan*: "Our authorities do not impose a categorical ban on every governmental action affecting the strategic decisions of an accused, including decisions

---

1984) (no falsification charge was brought against employee who made false statements to agency investigators; false statements considered in determining penalty), cert. denied, 470 U.S. 1054 (1985). Moreover, a charge of falsification cannot be sustained simply because an employee's statements regarding alleged misconduct are found to have been inaccurate. Rather, a falsification charge may be sustained only if the statements are found to have been made with the intent to deceive. See, *e.g.*, *Naekel* v. *Department of Transp.*, 782 F.2d 975, 977 (Fed. Cir. 1986). Cf. *Dunnigan*, 507 U.S. at 95 (noting that sentencing judge cannot automatically enhance sentence simply because defendant testified at trial but was convicted).

whether or not to exercise constitutional rights." 507 U.S. at 96 (citing cases). Thus, as has been noted, the Court in *Dunnigan* upheld the practice of enhancing a criminal defendant's sentence under the Sentencing Guidelines based on the sentencing judge's determination that the defendant had committed perjury at trial, notwithstanding the claim that the practice chilled defendants' exercise of their right to testify. *Ibid.* See also, *e.g.*, *Hayes*, 434 U.S. at 362-365 (rejecting claim that plea bargaining unconstitutionally pressures innocent defendants to plead guilty).

a. The court of appeals' ruling will seriously impede agencies' ability to investigate and resolve allegations of employee misconduct

Federal agencies investigating allegations of employee misconduct necessarily require the assistance of their employees. See, *e.g.*, *Weston* v. *HUD*, 724 F.2d 943, 949 (Fed. Cir. 1983) ("A large enterprise cannot be managed effectively absent a willingness of its members to support its internal fact-finding endeavors."). It is thus well established that federal employees must cooperate in such investigations, and that employees who refuse to cooperate may be disciplined or removed. *Id.* at 947-951 (upholding removal of employee who refused to cooperate with HUD Inspector General's internal investigation into allegations of conflict of interest involving employee).

If the alleged misconduct is criminal in nature, the agency's questioning may implicate the employee's Fifth Amendment privilege against self-incrimination. Even if that is so, the employee can still be required to cooperate with the investigation, so long as the employee is advised that the employee's state-

ments will not be used against the employee in criminal proceedings. *Weston*, 724 F.2d at 948. As one court put it:

> To require a public body to continue to keep an officer or employee who refuses to answer pertinent questions concerning his official conduct, although assured of protection against use of his answers or their fruits in any criminal prosecution, would push the [Fifth Amendment] beyond its language, its history or any conceivable purpose of the framers of the Bill of Rights.

Uniformed Sanitation Men Ass'n v. *Commissioner of Sanitation*, 426 F.2d 619, 626 (2d Cir. 1970), cert. denied, 406 U.S. 961 (1972). See also *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280, 285 (1968) ("[P]etitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights.").

Employees' obligation to participate extends beyond the agency's preliminary investigation. For example, if an employee challenges an agency's adverse action by appealing to the MSPB, full discovery is available during proceedings before the administrative judge, 5 C.F.R. 1201.71-1201.75 (1997), and the administrative judge may order an evidentiary hearing at which sworn testimony is taken, 5 C.F.R. 1201.41(b) (1997). The employee who is challenging the adverse action may be required to participate in discovery and to testify at a hearing. See 5 C.F.R. 5.4 (1997) (employees must provide information and testify under oath when required by MSPB personnel); *Reid* v.

United States Postal Service, 54 M.S.P.R. 648, 655 (1992) (employee challenging adverse action may be called by employer as witness at hearing). If the employee fails to comply with these obligations, sanctions may be imposed up to and including dismissal of the employee's appeal. Cf. *Roth* v. *Department of Transp.*, 54 M.S.P.R. 172, 175-177 (1992) (where employee willfully refused to attend deposition, administrative judge did not abuse discretion by imposing sanction that had effect of causing dismissal of appeal), aff'd, 988 F.2d 130 (Fed. Cir. 1993) (Table).

If, however, employees suspected of misconduct are free to lie during agency investigations without fear of employment sanction, the reliability of the information agencies receive from their employees will doubtless be significantly reduced.[11] Inevitably, agency investigations will be impeded and obstructed, and in some cases agencies will reach inaccurate conclusions about allegations of employee misconduct.[12] Cf.

---

[11] Of course, the possibility of criminal prosecution for false statements or perjury might remain. Because of limits on prosecutorial resources, *inter alia*, that possibility is not necessarily so great as to result in a very high level of deterrence. Cf. *ABF Freight System, Inc.* v. *NLRB*, 510 U.S. 317, 329 (1994) (Scalia, J., concurring in the judgment) ("United States Attorneys doubtless cannot prosecute perjury indictments for all the lies told in the Nation's federal proceedings."). In any event, the possibility of criminal prosecution for false statements or perjury is not a substitute for other appropriate consideration of such conduct. Cf. *Grayson*, 438 U.S. at 53-55 (perjury at trial may be considered at sentencing on underlying offenses, even though it also may be punished separately in subsequent criminal prosecution for perjury).

[12] Often, false statements by employees about their involvement in misconduct will have the effect of impeding an agency's investigation into wrongdoing by other employees.

Sentencing Guidelines § 3C1.1 & Application Note 3(g) (requiring enhancement of sentence of defendants who impede investigation by making material false statements to criminal investigators).

The same is true with respect to administrative proceedings before the MSPB. If employees are free to lie in connection with such proceedings without fear of employment sanction, as the court of appeals held, the reliability of employees' statements and testimony will certainly diminish, with a corresponding adverse effect on the accuracy of the proceedings.[13] As this Court recently noted,

---

For example, respondents Roberts and Barrett falsely denied having helped build a fishing pond for their supervisor during work hours. Pet. App. 71a. Those false denials may well have impeded the agency's investigation not only into their misconduct, but also into the misconduct of their supervisor.

[13] An extreme example of this is provided by the decision of the MSPB in respondent McManus's case. Pet. App. 97a-105a. In order to determine the proper discipline to be imposed upon McManus for making sexual remarks to a subordinate, the MSPB had to resolve a conflict in testimony between McManus and the subordinate as to whether the remarks were welcome. *Id.* at 100a. The MSPB concluded, however, that it could not lawfully consider, in resolving this conflict, the fact that McManus had originally falsely denied making the remarks at all. *Ibid.* The MSPB went on to find that at least some of the remarks were welcome. *Id.* at 101a-102a.

Immunizing employees from even the impeaching effect of their prior false statements stands in stark contrast to this Court's cases, which hold that defendants who testify falsely may generally be impeached with their prior inconsistent statements, even if evidentiary use of those statements would otherwise be foreclosed by the exclusionary rule. See, *e.g.*, *Havens*, 446 U.S. at 624-628.

> In any proceeding, whether judicial or administrative, deliberate falsehoods "may well affect the dearest concerns of the parties before a tribunal," and may put the factfinder and parties "to the disadvantage, hindrance, and delay of ultimately extracting the truth by cross examination, by extraneous investigation or [by] other collateral means."

ABF Freight System, Inc. v. *NLRB*, 510 U.S. 317, 323 (1994) (quoting *United States* v. *Norris*, 300 U.S. 564, 574 (1937)).

One of the principal concerns of the Due Process Clause is the accuracy of proceedings through which determinations are made respecting individuals' property and liberty interests. See, *e.g.*, *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 13 (1979) ("The function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions."). See also *Loudermill*, 470 U.S. at 544 (purpose of due process right to pre-termination hearing is to provide "an initial check against mistaken decisions"). It would be anomalous indeed, therefore, to interpret the Due Process Clause as granting anyone a right to attempt to distort the accuracy of such proceedings through intentional deceit. To the contrary, "[f]alse testimony in a formal proceeding is intolerable. We must neither reward nor condone such a 'flagrant affront' to the truth-seeking function of adversary proceedings." *ABF Freight System*, 510 U.S. at 323.

b. The court of appeals' ruling will seriously interfere with the ability of the federal government to determine when to discipline or remove employees who lie

This Court has recognized that the "Government has compelling interests in maintaining an honest police force and civil service." *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 (1977). Federal law fully reflects that compelling interest. Thus, federal employees are specifically directed not to "engage in * * * dishonest * * * conduct." 5 C.F.R. 735.203 (1997). The federal courts and the MSPB have repeatedly held that federal agencies may discipline or remove employees for engaging in dishonest conduct related to their employment.[14] See, *e.g.*, *Gipson* v. *Veterans Administration*, 682 F.2d 1004, 1011-1012 (D.C. Cir. 1982) (upholding removal of employee for falsifying medical records; "the falsification of government records is a serious offense in any context"); *Hamilton* v. *Department of the Air Force*, 52 M.S.P.R. 45, 47 (1991) (upholding removal of employee for making false statement in employment application, stating: "The [MSPB] has held that removal for falsification of government documents promotes the efficiency of the service because such falsification raises serious doubts regarding the employee's honesty and fitness for employment."), aff'd, 980 F.2d 744

[14] Although the present cases involve false statements made in the course of employment, employees in some circumstances may also be disciplined or removed for dishonest conduct less directly related to employment. See, *e.g.*, *Fike* v. *Department of the Treasury*, 10 M.S.P.R. 113, 116-117 (1982) (upholding removal of IRS employee convicted of false pretenses for submitting false claim to insurance company).

(Fed. Cir. 1992) (Table). Cf. *NLRB* v. *Mueller Brass Co.*, 509 F.2d 704, 713 (5th Cir. 1975) ("Any employer has the right to demand that its employees be honest and truthful in every facet of their employment.").[15]

These principles apply equally to employees who make false statements during an agency investigation into alleged misconduct by the employee. Indeed, up until the present cases, the MSPB had consistently upheld agencies' power to discipline or remove such employees. See, *e.g.*, *Greer* v. *United States Postal Sevice*, 43 M.S.P.R. 180, 184-187 (1990) (upholding suspension of employee for committing misconduct and making false statements to supervisor about it); *Vazquez* v. *Department of Justice*, 12 M.S.P.R. 379, 381-384 (1982) (upholding removal of INS agent for improper conduct and for making false statements to investigators; employee "clearly undermined the agency's confidence in his veracity when, over a period of several months, he adamantly denied knowledge of the incident"). A rule that federal agencies may not remove or discipline employees for making false statements is incompatible with the govern-

[15] Because dishonest conduct related to employment "goes to the heart of the employer-employee relationship," it often results in removal of the offending employee. *Pichot* v. *Department of Justice*, 29 M.S.P.R. 477, 481 (1985). There is no per se rule requiring removal as the sanction for dishonest conduct, however, and agencies in some circumstances conclude that a lesser sanction would be appropriate. For example, in the present case, the Department of the Interior imposed discipline short of removal upon respondents Barrett and Roberts, even though they had made false statements during the agency's investigation. Pet. App. 71a.

ment's compelling interest in ensuring the integrity of the federal civil service.[16]

D. The Holding Of The Court Of Appeals Draws Into Question The Constitutionality Of Other Important Disciplinary Systems

The due process right created by the court of appeals in the context of federal public employment would presumably apply equally to the many state and local public employees who have a protected property interest in their continued employment. Cf., *e.g.*, *Loudermill*, 470 U.S. at 538-541 (finding that employees of local school boards had property interest in continued employment). State and local public employers frequently discipline or remove their employees for making false statements in connection with investigations into employee wrongdoing,[17] and the rule adopted by the court of appeals would prohibit that practice as a matter of federal constitutional law. Forbidding state and local public employers from

[16] Although the government's interests in the present cases are compelling, such a showing is not essential for the government to prevail against a procedural due process claim. See, *e.g.*, *Homar*, 117 S. Ct. at 1807 (state has "significant" interest in immediately suspending employees charged with felony).

[17] See, *e.g.*, *Talmo* v. *Civil Service Comm'n*, 282 Cal. Rptr. 240, 252 (Ct. App. 1991) (upholding dismissal of deputy sheriff for committing misconduct and lying to superiors about it; "When an officer of the law violates the very law he was hired to enforce and lies about it to his superiors he forfeits the trust of his department and the public."); *Christenson* v. *Board of Fire & Police Comm'rs*, 404 N.E.2d 339, 341-343 (Ill. App. Ct. 1980) (police officer disciplined for committing misconduct and lying about it); *Williams* v. *Dooley*, 538 N.Y.S.2d 871, 872-873 (App. Div. 1989) (correctional officer dismissed for committing misconduct and giving false information during investigation).

disciplining or removing their employees for making false statements about their misconduct would be a substantial and unwarranted federal intrusion into the employment relationships between state and local public employers and their employees.

The approach adopted in these cases would also have profound implications for the present system of attorney discipline. Attorneys generally have a right under the Due Process Clause to notice and an opportunity to be heard before they are disbarred. *In re Ruffalo*, 390 U.S. 544, 550 (1968). They are required to cooperate with investigations into allegations that they may have committed misconduct.[18] See *Model Rules of Professional Conduct* Rule 8.1(b) ("a lawyer * * * in connection with a disciplinary matter, shall not * * * knowingly fail to respond to a lawful demand for information from [a] * * * disciplinary authority"). And, they are frequently disciplined or disbarred for making false statements during the disciplinary process. See *id.* Rule 8.1(a) ("a lawyer * * * in connection with a disciplinary matter, shall not * * * knowingly make a false statement of mate-

[18] As with employee discipline, Fifth Amendment issues may arise where the attorney's alleged misconduct is criminal in nature. See, *e.g.*, *Spevack* v. *Klein*, 385 U.S. 511, 514-516 (1967) (opinion of Douglas, J.) (lawyer may not be disbarred for asserting Fifth Amendment privilege in disciplinary proceeding); *id.* at 519-520 (opinion of Fortas, J., concurring in the judgment) (same). Also as with employee discipline, however, an attorney who would otherwise have a Fifth Amendment privilege may nevertheless be compelled to testify in disciplinary proceedings if the attorney is given adequate assurance that any testimony given will not be used against the attorney in criminal proceedings. See, *e.g.*, *In re March*, 376 N.E.2d 213, 217-220 (Ill. 1978).

rial fact"), Rule 8.4(c) ("It is professional misconduct for a lawyer to * * * engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."). See also, *e.g.*, *Worth* v. *State Bar*, 586 P.2d 588, 590 (Cal. 1978) (false statement to state bar disciplinary authorities was "greater offense" than underlying misconduct of misappropriating client's funds). See generally ABA Center for Professional Responsibility, *Annotated Model Rules of Professional Conduct* 527-537 (3d ed. 1996).

If the court of appeals were correct that the Due Process Clause forbids the imposition of discipline on federal employees in analogous circumstances, it would arguably follow that the Due Process Clause forbids the discipline or disbarment of attorneys who lie to bar authorities about allegations that they have committed misconduct. Such a conclusion would clearly be inconsistent with the strong public interest in ensuring the integrity of the members of the bar.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
SETH P. WAXMAN
Deputy Solicitor General
ROY W. MCLEESE III
Assistant to the Solicitor General
DAVID M. COHEN
TODD M. HUGHES
Attorneys

LORRAINE LEWIS
General Counsel
STEVEN E. ABOW
JOSEPH E. MCCANN
ANA A. MAZZI
Attorneys
Office of General Counsel
Office of Personnel Management

AUGUST 1997

No. 96-1395

In The

Supreme Court of the United States

October Term, 1996

JAMES B. KING, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

vs.

LESTER E. ERICKSON, JR., ET AL.

Respondents.

JAMES B. KING, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

vs.

HARRY R. McMANUS, ET AL.

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR THE RESPONDENT JEANETTE WALSH

JOHN R. KOCH
REICHERT, WENNER, KOCH
& PROVINZINO, P.A.
501 St. Germain
St. Cloud, MN 56302
(320) 252-7600
Counsel for Respondent
Jeanette Walsh

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether federal employees can be sanctioned both for misconduct and for falsification for denying the facts underlying the misconduct.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

STATEMENT

Respondent Jeanette Walsh was employed by the Department of Veteran Affairs as a Social Service Assistant in the agency's medical center in St. Cloud, Minnesota. Pet. App. 2a. In 1988 the agency received information that Walsh had engaged in a sexual relationship with a chemical dependency inpatient at the center. Resp. Walsh App. A6; Pet. App. 32a. Both Walsh and the patient were interviewed and both denied the relationship. Resp. Walsh App. A6. In July 1991 the patient changed his story and complained that he had had a sexual relationship with Walsh while he was an inpatient at the center. Pet. App. 33a. Walsh was again interviewed by agency investigators and again denied that she had an intimate relationship with the patient while he was an inpatient between April 1988 and November 1, 1988. *Id.* at 32a. Walsh was subsequently served with a removal notice charging her (1) with having an intimate sexual relationship with a patient while he was an inpatient at the center, (2) for improper financial dealings with patients, and (3) for providing false and misleading information on seven different matters, including denying engaging in an intimate relationship with the complaining patient while he was an inpatient at the medical center. Resp. Walsh App. A2-4.

In an initial decision, an administrative judge found that the agency had failed to prove the intimate relationship, the improper financial dealings, or *any* of the falsification charges. Walsh Initial Decision (No. CH-0752-92-0021-I-1) (MSPB Feb. 7, 1992); Resp. Walsh App. A4-14. The Department of Veteran Affairs petitioned the Merit Systems Protection Board for review. The

MSPB reversed in part, finding that Walsh had engaged in sexual relations with an alcohol-dependent patient at the agency medical center, but also holding that an agency may not charge an employee with misconduct and separately charge her with falsification for denying the underlying misconduct. Pet. App. 42a.

This decision was combined with MSPB decisions in Erickson, Barrett and Roberts, and Kye, and appealed to the Court of Appeals, which affirmed in *King v. Erickson*, 89 F.3d 1575 (Fed. Cir. 1996). The reasoning of the court of appeals is adequately set forth in the Statement of the Case of the petitioner. Pet. Br. 11-13.

SUMMARY OF ARGUMENT

Petitioner's argument is predicated upon the assumption that an employee's denial of work-related misconduct which is subsequently proven constitutes a false statement. According to petitioner, the court of appeals' recognition of a federal employee's right to deny both the charge and the related facts without being subject to a falsification charge is tantamount to creating an "expansive right to lie." While advancing this position, petitioner neglects the distinction between an active attempt to deceive or mislead, which is undoubtedly a falsification, and a simple denial of factual allegations of misconduct, which is generally viewed as neutral and intended primarily to preserve one's right to maintain a defense to charges.

Under federal law, in order to establish a falsification charge, an agency must establish by preponderant evidence that the employee knowingly imparted false information with intent to deceive or mislead the agency. The words "mislead" and "deceive" imply affirmative declarations of fact designed to create false impressions to lead the agency astray. However, when an agency conducts a full investigation and formulates factual allegations which its investigators propound to the employee with a demand to admit or deny, the denial of those facts is not a "lie" or "false statement", both as a matter of logic and language, and as an exercise of the employee's due process right to deny the charge and to require the agency to prove the charge by substantial evidence. By its very nature, a denial under these circumstances is not a falsification and does not subject the employee to additional penalties even if the charge is subsequently proven by substantial evidence.

Due process implications arise from the agency's depriving or seeking to deprive an employee of the property interest in his employment by doubling up a misconduct charge with a falsification charge stemming from the employee's denial of the facts underlying the misconduct. In Walsh's case, the penalty for the misconduct charge was a 90-day suspension; the penalty for the combination charges was dismissal from her position. In addition, the threat of new charges for falsification for the denial of the factual basis of misconduct creates a "chilling effect" on employees' rights to defend themselves.

ARGUMENT

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT DENIALS OF CHARGES AND RELATED FACTS ARE NOT GROUNDS FOR SEPARATE FALSIFICATION CHARGES AND CANNOT BE CONSIDERED IN DETERMINING A PENALTY

The issue in this case is whether federal employees can be sanctioned both for misconduct and for falsification for denying the facts underlying the misconduct. The court of appeals held that denials of misconduct charges and related facts cannot be considered in determining a penalty.

A. Allowing Agencies To Charge Employees With Falsely Denying Facts Underlying Misconduct Charges Is Inconsistent With Employees' Due Process Rights To Defend Themselves

Under the Fifth Amendment, "No person shall be . . . deprived of . . . property, without due process of law. . . . " "The protections of the Due Process Clause apply to government deprivation of those perquisites of government employment in which the employee has a constitutionally protected 'property' interest." *Gilbert v. Homar*, 117 S.Ct. 1807, 1811 (1977); *see also, Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972). Tenured federal employees have a protected property interest in their employment. *See* 5 U.S.C. § 7513 (1994). Procedural safeguards of this property interest are provided by 5 U.S.C. § 7513(b) (1994), which allows for notice, a reasonable time to respond, legal representation and a written, reasoned decision. While this statute

facially provides federal employees with adequate procedured safeguards (*see Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-548 (1985)), the more difficult question involves the due process implications of depriving federal employees of the property interests in their jobs by attaching penalties for falsification resulting from an employee's denial of the factual basis of a charge of misconduct. In finding the double sanction to be a denial of due process, the court of appeals summarized its rationale in *Grubka v. Department of Treasury*, 858 F.2d 1570, 1575 (Fed. Cir. 1988):

> It has always been the rule and practice that a person charged with an offense can deny the charge and plead not guilty, either because he is not guilty or to force the charging party to prove the charge, and, regardless of the outcome, the denial is not itself a separate offense. Otherwise, a person could never defend himself against a charge, even though frivolous, for fear of committing another offense by denying the charge. . . .

The court noted that "[a]llowing an agency to charge an employee with falsely denying facts underlying a misconduct charge would deprive the employee of a *meaningful* opportunity to respond to the charges." Pet. App. 16a. The court also declared:

> An agency has means to prove charges other than through admissions or denials of an employee under investigation. While it might be easier for an agency to prove a charge by using the leverage of an added charge of falsification to compel admissions, due process requires that an employee be allowed to deny both the charge

and the underlying facts without being subject to a falsification charge.

Ibid. at 19a.

The actual threat of additional penalties was confronted by Walsh when she was required to give a taped interview in 1991. The Veterans Administration had already secured ten written statements and had, by its investigator's admission, "consistent" and "very reliable" evidence that Walsh had engaged in misconduct. When its investigators conducted their interview of Walsh, they posed precise and detailed questions to her, requiring her to steer between the Scylla of admission, which would have effectively prevented a defense, and the Charybdis of denial, which carried the announced threat of enhanced sanctions. This dilemma was totally unlike the circumstance posed by *United States v. Dunnigan*, 507 U.S. 87 (1993), where the defendant could have avoided the increased sentence by declining to testify. When Walsh was asked to admit or deny, she was compelled to respond. See *Weston v. HUD*, 724 F.2d 943 (1983). She was not protected by any Fifth Amendment rights which allowed her either to remain silent or to refrain from testifying.

Moreover, the extent of the federal employee's dilemma under these circumstances is compounded because the penalties for falsification resulting from the denial of facts may actually prove more severe than for the underlying misconduct. In *Walsh*, when the MSPB reversed the administrative judge determination and found that the charge of having an intimate relationship with an inpatient of the medical center was proven,

Walsh received a penalty of a 90-day suspension. By comparison, the Veterans Administration was seeking dismissal for the combined charges of sexual misconduct and falsification.

When the V.A. investigators required Walsh to submit to an interview regarding her conduct, they did not forego the opportunity to apply additional pressure upon her. They informed her that they had a strong and thoroughly reliable case against her.[1] They also told her that she could be assessed with additional penalties "for not answering the questions right." See footnote 1. The court of appeals recognized the coercive potential that is implicit in these situations: "If agencies were allowed to inform employees under investigation for misconduct

---

[1] Near the conclusion of her interview, an investigator asked: "A lot of the questions that we are asking are based on testimony from other interviews we have conducted with other individuals through the course of this investigation. There are a lot of consistencies from the number of persons that have responded and they are very reliable and they are consistent from person to person. These persons have not had any contact with any other individuals that we have interviewed. In the course of this we do want to remind you that you do have the right to representation but you also have the obligation and responsibility to truthfully answer the questions we ask you to the best of your knowledge. You can be held accountable for not answering these questions right so proven from other matters within the investigation. And I think it is in your best interest that you answer these questions as honestly and as best you can recollect. With that, I will ask you were you intimately involved, did you have any sexual relationship with Richard Brown while he was a resident of the Domiciliary?" Jeanette Walsh Interview Transcript, p. 19.

that their denial of facts may subject them to an additional falsification charge, they may be coerced into admitting the misconduct, whether they believe that they are guilty or not, in order to avoid the more severe penalty of removal possibly resulting from a falsification charge." Pet. App. 16a-17a. The court expressed concern that this might leave employees without a meaningful opportunity to respond or provide a defense, or at the least would create a "chilling effect" on their clear right to defend themselves. *Ibid.*

The dilemma is further complicated by credibility factors. The court of appeals noted that to render "denials as actionable falsehoods might too readily transform credibility determinations into separate charges of falsification." Pet. App. 17a. *Walsh* is a perfect example. After Walsh was removed from her position on two misconduct and seven falsification charges, an administrative judge found that none of the agency charges had been proved. However, the sexual misconduct charge was later reversed by the MSPB because of inconsistencies in Walsh's statements which the MSPB found justified discrediting other parts of her testimony under formal evidentiary presumptions. See Pet. App. 32a.[2] The fact that

---

[2] The MSPB reversed the administrative judge because Walsh admitted a "relationship" in November 1988 although she denied that it was sexual at that time. The MSPB found that Walsh's statement and later affidavit were inconsistent, tipping the decision against her. The patient, on the other hand, was a lifelong alcoholic and had a history of conflicting stories. The sexual relationship was raised in 1991 by the patient's wife who was outraged by the prospect of the patient entering a long-term chemical dependency treatment program in Wisconsin,

Walsh's inconsistent statements were given three years apart and did not themselves touch upon the key question of whether she had a sexual relationship with an *inpatient* of the medical center, reinforces the court's concern that close credibility determinations make it difficult to find that an employee is ipso facto guilty of falsification only because the underlying charge is sustained.

B. The Court Of Appeals Ruling Does Not Sanction A "Right To Lie."

Petitioner argues that there is no constitutional right to lie or to make false statements. No one takes issue with this broad assertion. The decision of the court of appeals is emphatic that "employees do not otherwise have a right to lie or make false statements to an agency, and such false statements made during agency investigations and relating to alleged misconduct may properly be subject to falsification or similar charges." Pet. App. 21a. Petitioner's complaint is that the court of appeals did not treat a denial of a charge or its related facts as a lie, a false statement, or a falsification; instead the court held that "an employee's denial of the factual basis of a charge may not be used as the basis for a falsification charge." Pet. App. 15a. The reason given by the court of appeals is that the "effect of it is to hold that a denial of a charge itself becomes a separate proven offense if what is denied is proven to be true." *Ibid.*

---

when the same treatment was thought to be available at the V.A. Medical Center in St. Cloud, Minnesota, except for Walsh's employment there.

While the court of appeals took great care to define limitations compatible with the falsification rules used in the federal system, petitioner's brief dramatically changes the tone of the court's language. The word "denial" as used by the court of appeals is transformed by petitioner to "false statement". A "right to deny and defend" becomes an "expansive right to lie". Petitioner even recasts the overall issue to ask whether due process precludes an agency from sanctioning an employee for making *false statements* to the agency regarding employment-related misconduct. This refashioning of the terminology, although effective advocacy, essentially distorts the true issue presented in this petition, namely, whether denials of charges and related facts constitute falsifications warranting increased penalties.[3] The court of appeals made no suggestion that federal employees should be allowed to lie or tell false statements, and petitioner is undoubtedly right that there is no constitutional protection for such activity.

While there is no constitutional right to lie, petitioner's brief is silent on the critical issue relating to the legal criteria for a falsification charge under federal law. In order to establish a falsification charge, an agency must establish by preponderant evidence that the employee knowingly imparted false information with specific intent to defraud or mislead the agency. *Howard v. Department of Treasury*, 46 M.S.P.R. 492, 494 (1990);

---

[3] Notably, the falsification charge against Walsh was: "You denied having an intimate relationship with Mr. Brown while he was an inpatient at the medical center." See Resp. Walsh App. A4.

Naekel v. Department of Transportation, 782 F.2d 975 (Fed. Cir. 1986) (the charge of falsification of a government document requires proof not only that the answer is wrong but also that the wrong answer was given with the intent to deceive or mislead the agency).

In evaluating an employee's conduct, it is useful to consider the key elements of a falsification charge. By definition, falsification requires not only that the answer be wrong but that it be made with the intent to deceive and mislead. Here ordinary dictionary definitions are helpful. "Deceive" means "to cause to accept as true or valid what is false or invalid".[4] "Mislead" means "to lead in a wrong direction or into a mistaken action or belief often by deliberate deceit."[5] "Lie" means "to make an untrue statement or allegation, with intent to deceive or to create a false and misleading impression."[6] "False Statement" means an untrue "report of facts or opinions" or an untrue "declaration or remark."[7] All of these represent affirmative declarations of fact or opinion, often with a dishonest purpose. By contrast, the term "denial" implies the more passive quality of "refus[ing] to admit the truth or reality (as of a statement or charge)."[8] Denial is responsive, not assertive; it seeks to traverse a statement, not to misdirect or to lead astray.

---

[4] Webster's Ninth New Collegiate Dictionary (Merriam-Webster, Inc. 1988), p. 329.

[5] *Ibid.*, p. 759.

[6] *Ibid.*, p. 689.

[7] *Ibid.*, p. 1151.

[8] *Ibid.*, p. 339.

In the *Walsh* case, the denials consisted of Walsh answering "no" to a series of detailed questions propounded by agency investigators alleging misconduct. Although the denial of sexual misconduct was the "wrong answer" in light of the MSPB's eventual decision that the agency had sustained that charge, the denial still did not satisfy the substantial evidence standard[9] for falsification which requires an intent to deceive or mislead. An examination of the Walsh interview transcript shows that both the investigator's questions and Walsh's answers presented little scope to deceive or mislead. Walsh was the eleventh witness interviewed during the investigation. She was told that the other interviews were consistent and "very reliable".[10] The questions themselves were mostly statements of fact, detailed and specific, and calling for yes or no answers. Walsh's responses were negative and defensive, offering little opportunity to misdirect the agency. The Veteran's Administration was not diverted from its purpose: it acted immediately to remove her from her position on both misconduct and falsification charges.

An examination of Walsh's interview also plainly indicates that the goal of the agency investigators was not to gather information but to obtain admissions from Walsh that would have had the effect of foreclosing any chance of defense. From the outset, the investigators announced to Walsh that they had reliable and consistent information from others. Walsh was not so much asked for information as for *confirmation* of the facts the agency

---

[9] See 5 U.S.C. § 7703(c)(3) (1994).

[10] See footnote 1.

already possessed. In actuality, she was asked to admit or deny charges. Her denials of these charges did not evidence an intent to mislead the agency but rather expressed her purpose to preserve her right to "deny and defend". The court of appeals recognized this right by holding that in the circumstances of Walsh's interview, denials were not actionable falsehoods. See *Naekel v. Department of Transportation*, 782 F.2d at 979 (no *per se* evidentiary rule that statement or omission establishes intent to deceive).

C. The Limited Right To Deny Charges And Related Facts Will Not Disrupt The Federal Employment System Or Other Important Disciplinary Systems.

Petitioner expresses a concern that the right conferred by the court of appeals to deny charges and related facts without being subject to additional sanctions for falsification represents a departure from existing precedent and will interfere with the ability of the federal government to determine when to discipline or remove employees who make false statements or otherwise engage in dishonest conduct. First, as the court of appeals explained, the refusal to consider an employee's denials of charges and related conduct as justification for an enhanced penalty is not inconsistent with *United States v. Dunnigan*, 507 U.S. 87 (1993). In that case, the Supreme Court held that the sentence of a criminal defendant who commits perjury at trial may be enhanced under federal sentencing guidelines. There are significant distinctions between the perjury of a criminal defendant at trial and the denials of a federal employee in an interview. The

foremost distinction is that even though, during the sentencing stage, the district court uses a preponderance of evidence standard in making findings that the defendant's false testimony constituted a willful obstruction of justice, the court can freely rely, as it did in *Dunnigan*, upon the jury verdict rendered beyond a reasonable doubt that the defendant's testimony was perjured. *See* 113 S.Ct. at 1114. By contrast, the findings in *Walsh* were based on credibility determinations using evidentiary presumptions. Moreover, the denials in *Walsh* were compelled and were not designed to influence the attitude of the investigators, who had already announced that they had a solid case against Walsh, but were instead meant to preserve her right to a meaningful defense.

Petitioner repeatedly returns to the theme that the court of appeals decision creates a broad-based "right to lie" or right to make deliberate falsehoods in the federal employment system or in other important disciplinary systems. However, most of the cases it submits in support of its position are not analogous with the present facts. In *United States v. Grayson*, 438 U.S. 41 (1978), the Court held that taking a defendant's false testimony into account did not violate due process and did not impermissibly chill his constitutional right to testify. The district court had concluded that the defendant's testimony "was a complete fabrication without the slightest merit whatsoever." 438 U.S. at 44. Similarly, in *Dunnigan*, the Court noted that "[g]iven the numerous witnesses who contradicted respondent regarding so many facts on which she could not have been mistaken, there is ample support for the District Court's finding." 507 U.S. at 95-96.

In *Weston v. HUD*, 724 F.2d 943 (1983), the discharge of an employee was upheld when the employee refused to submit to questioning even when advised that criminal prosecution against her had been declined by the United States Attorney and that information gained from the interview could not be used against her in a criminal proceeding under *Garrity v. New Jersey*, 385 U.S. 493 (1967). See also, *Uniform Sanitation Men Ass'n v. Commissioner of Sanitation*, 426 F.2d 619, 626 (2d Cir. 1970), cert. denied, 406 U.S. 961 (1972) (discharge proper where an employee refuses to answer questions after receiving *Garrity* protection).

These examples can be extended but they apply primarily to employees who engage in dishonest conduct relating to their employment. See 5 CFR. 735.203 (1997); *Gipson v. Veteran's Administration*, 682 F.2d 104, 1011-1012 (D.C. Cir. 1982) (upholding removal of employee for falsifying medical records). As stated throughout, there is no constitutional or legal authority approving dishonest conduct or false statements made with the intent to deceive or mislead. The court of appeals recognized this, but further recognized that denials of factual allegations made for the purpose of preserving an employee's right of defense do not fit into this category. Where an employee simply denies a charge or the underlying facts relating to that charge, it is improper for an agency to charge the employee separately with falsification or to consider the denial in determining the penalty. Pet. App. 21a.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

REICHERT, WENNER, KOCH
& PROVINZINO, P.A.

JOHN R. KOCH
Attorney for Respondent
Jeanette Walsh
501 St. Germain
P.O. Box 1556
St. Cloud, MN 56302
(320) 252-7600

September 1997

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

JEANETTE WALSH, Appellant, v. DEPARTMENT OF VETERANS AFFAIRS, Agency.	DOCKET NUMBER CH-0752-92-0021-I-1 DATE: February 7, 1992

John R. Koch, Esquire, St. Cloud, Minnesota, for the appellant.

Dale E. Parker, Esquire, Fort Snelling, St. Paul, Minnesota, for the agency.

BEFORE

Gregory A. Miksa
Administrative Judge

INITIAL DECISION

INTRODUCTION

On October 10, 1991, the appellant, Jeanette Walsh, appealed from the September 26, 1991 action of the agency that removed her from her position as a Social Services Assistant, GS-6, at the agency's St. Cloud, Minnesota Medical Center based on charges that she engaged in an intimate relationship with a patient of the Medical Center, that she further engaged in improper financial

dealings with patients of the agency, and that she provided false and misleading information to the agency. The Board has jurisdiction over the appealed action. *See* 5 U.S.C.A. §§ 7511(a)(1)(A), 7512(1), 7513(d) (West 1980); and 5 C.F.R. §§ 752.401(a) and (b)(1), and 752.405(a) (1991).

The appellant did not request a hearing concerning the issues raised by her appeal. Accordingly, this decision is based on the written submissions of the parties. For the reasons stated below, the agency's action is reversed.

ANALYSIS AND FINDINGS

At the time of her removal the appellant was employed as a Social Services Assistant in Building 9 at the agency's Domiciliary, a dormitory for inpatients being treated for alcoholism and substance abuse. From her supervisor's affidavit, and from the appellant's affidavit and statements, it appears that her interaction with the patients at that facility during the relevant time periods covered by the agency's charges was limited to issuing patient passes to leave the facility, conducting attendance checks, and making rounds from room to room to assure the patients' safety. According to agency substance abuse counselor Siri Krawchuk from Building 2 of the facility, at some point during the past three years the appellant began to assist her in Monday evening aftercare family sessions, attended by up to thirty-five former inpatients and their family members, at Building 2 of the agency's St. Cloud Medical Center. Ms. Krawchuk stated that the appellant's function at these sessions was limited to taking notes so that Ms. Krawchuk was free to guide the

sessions. *See* Agency file tab 4m. No other evidence was produced by the agency to show that as part of her official duties as a Social Services Assistant the appellant had any professional involvement in individual or group counseling with the facility's patients.

In an August 16, 1991 notice, the agency advised the appellant that her removal was proposed based on two charges. Under its first charge, engaging in improper relationships with Medical Center patients, the agency specified the following:

> A. You were involved in an intimate sexual relationship with veteran patient Richard Brown from September-November 1988 while he was under your care as an inpatient at the Domiciliary. This relationship continued until approximately April of 1990 while he was on an outpatient status. This relationship was viewed by others as unprofessional, detrimental to Mr. Brown, and counter to the treatment program prescribed for him.
>
> B. You were involved in financial dealings with beneficiaries of the VA as follows:
>
> - You sold Mr. Brown "Home Interior" products in the amount of $68.00. You also distributed literature and sold these products to other Domiciliary patients while on duty.
>
> - You recently provided a room in your home to patient Terry Neely. In exchange for his room, he paid you by performing labor around your home.
>
> You used your position as a patient care provider to your advantage in dealings with these

vulnerable veteran patients who were under your care.

See Agency file tab 4h, pg. 1.

Under its second charge, providing false or misleading information to a supervisor and to agency investigators, the agency specified:

A. You denied having an intimate relationship with Mr. Brown while he was an inpatient at this medical center.

B. You denied making repeated phone calls to Richard Brown at the Willet residence, Mr. Brown's sponsor, when in fact you called on numerous occasions.

C. You denied selling "Home Interior" products to inpatients of the Domiciliary, including Mr. Brown.

D. You denied calling anyone over Thanksgiving weekend 1988 regarding the medical condition of Mr. Brown, when in fact you did call Mr. Willet.

E. You denied ever purchasing a bottle of liquor for Mr. Brown over Thanksgiving weekend 1988; however, you told Mr. Willet when you called him that you had purchased liquor for Mr. Brown.

F. You persuaded Mr. Brown to conceal your relationship with him to your supervisor in December 1989 when he questioned you about it.

G. You stated that you first met Mr. Brown in a bar in North Dakota; *however, you had not met Mr. Brown until his admission to the Domiciliary in 1988.*

See Agency file tab 4h, pg. 2 (Emphasis supplied).

The agency's first charge is not sustained

It is undisputed that Mr. Brown was a patient at the St. Cloud Medical Center from April 1988 when he was admitted to an inpatient program in Building 2 of the facility. In May 1988, Mr. Brown was transferred to Building 9, known as the "Domiciliary," where he remained as an inpatient until he was discharged on November 1 1988. The appellant admits that she had a personal and intimate relationship with Mr. Brown, but only after Mr. Brown's discharge from the facility Domiciliary on November 1, 1988. She states that she did have sexual relations with the appellant in the summer of 1989 when Mr. Brown was not an inpatient or outpatient of the agency's facility. She further states that she served as Mr. Brown's "Concerned Person" in December 1989 when he was an inpatient at another local hospital facility, St. Cloud Hospital, which is apparently not associated with the agency's St. Cloud Medical Center. *See* Record tab 9. It is also undisputed that during his relationship with the appellant, Mr. Brown was not married and that he met his current wife, Donna, during his relationship with the appellant. The record shows that the appellant's relationship with Mr. Brown terminated when he married his current wife.

The record further shows that the agency's investigation of the instant charges was initiated as a result of a June 24, 1991 letter received from Donna Brown. In this correspondence, Mrs. Brown complained that staff at the agency's St. Cloud Medical Center had determined, after

her husband's recent alcohol abuse relapse, that her husband should be admitted as an inpatient at another substance abuse treatment center in Kennic Falls, Wisconsin because his previous relationship with the appellant precluded him from re-admission as an inpatient at the St. Cloud Domiciliary.

Mrs. Brown's allegations, and the agency's investigators' concurrence in those allegations (concerning the asserted impact of the appellant's relationship with Mr. Brown on the staff recommendation that Mr. Brown be treated at Kennic Falls) are not supported by the sworn testimony of Mr. Brown's treating therapists, counselors, and social workers. Statements of agency Social Worker James Broda; Treatment Coordinator John Pucel, Ph. D.; Substance Abuse Counselor Siri Krawchuk; and the appellant's supervisor, Dr. Ron Williams, establish that Mr. Brown's relationship with the appellant did not influence their decision to recommend treatment for Mr. Brown at the Kennic Falls Domiciliary. *See* Agency file tabs 4l through 4n. Their statements show that they prescribed Mr. Brown's treatment at Kennic Falls due to the higher degree of structured care afforded at that facility and the severity of Mr. Brown's alcohol abuse problem. Dr. Pucel and Mr. Broda noted that the staff was, in fact, willing to re-admit Mr. Brown to the St. Cloud Domiciliary despite the patient's previous relationship with the appellant. Only one agency witness, Mr. Dahlger, stated his belief that the appellant's prior relationship with Brown was a factor in the recommendation. But it is not clear what role, if any, Mr. Dahlger played in making this recommendation, or why he came to this belief. *See* Agency file tab 4p.

Ms. Krawchuk explained that after the recommendation to place Mr. Brown at Kennic Falls was made by the staff, Mrs. Brown became extremely angry because Mr. Brown's admission in Kennic Falls would place him at a greater distance from her home in the St. Cloud, Minnesota area. Mrs. Brown had previously stated, however, that she would not allow her husband to return to their home until he had established his sobriety for a period of six months. One agency witness, Irene Oberman, Mr. Brown's primary nurse, stated that the recommendation to place Mr. Brown in Kennic Falls was to "get him out of that relationship [with his wife] for a while." *See* Agency file tab 4o, page 2. According to agency witnesses familiar with Mr. Brown's case, they were unaware of any prior relationship between the appellant and Mr. Brown until Mrs. Brown expressed her anger at the recommendation that her husband be treated in Kennic Falls due to her belief that the recommendation was based on his prior relationship with the appellant. *See* Agency file tabs 4l to 4n.

The statement of the appellant's supervisor, Dr. Ron Williams, shows that Dr. Williams obtained information from an undetermined source in November or December 1988 that the appellant might have had an intimate relationship with Mr. Brown while Brown was an inpatient at the St. Cloud Domiciliary in the period fro [sic] September through November 1, 1988. Dr. Williams stated, however, that upon questioning Mr. Brown in November or December of that year, apparently after his discharge as an inpatient, Mr. Brown denied having such a relationship with the appellant while he was an inpatient at the Domiciliary. *See* Agency file tab 4t.

Nevertheless, Mr. Brown's July 19, 1991 affidavit shows the following exchange between Mr. Brown and agency investigators:

> Investigator #1: More specifically, your wife sent a letter to Ron Williams, Chief of Domiciliary Service, St. Cloud VA Medical Center, alleging that an affair of a personal nature had taken place between you and Jeanette Walsh, a VA medical center employee. And furthermore, that incident played heavily into your being sent to Kennic Falls halfway house rather than being placed in the Domiciliary there at St. Cloud VA. Do you care to elaborate on that. How do you feel about it."
>
> Witness #7 [Mr. Brown]: What you say is true. In 1988, on or about September I was in the Domiciliary out there and I did get intimately involved with Jeanette while I was a client at the Domiciliary.
>
> Investigator #1.: While you were a client at the Domiciliary?
>
> Witness #7: While I was a client at the Domiciliary. . . .
>
> Investigator #1: How long did the relationship last?
>
> Witness #7: I would say approximately 6-7 months. I left the Domiciliary on the 1st of November in 1988 and I would see her off and on at her place or at my quarters but I was seeing her and spending the weekend passes at her home while I was a client.
>
> Investigator #1: Did any activity take place in the Domiciliary?

> Witness #7: There was several different occasions where she would come up to my room and we would carry on in my room in the Domiciliary, Building 9 in particular.
>
> Investigator #1. What do you mean carry on?
>
> Witness #7: Hugging and kissing, *no sex in the Domiciliary; that took place at her home.*

See Agency file tab 4j (Emphasis supplied).

Elsewhere in his statement, Mr. Brown claims that he falsely told Dr. Williams that he knew the appellant in North Dakota before he entered treatment at St. Cloud because the appellant allegedly asked him to make that statement.

The only potential corroboration for Mr. Brown's statement about his alleged sexual relationship with the appellant while he was an inpatient is found in the statement of Dale Willet (taken jointly with his wife, Linda Willet). Mr. Willet admits that he does not know if the appellant's relationship with Mr. Brown during his inpatient stay in 1988 involved sexual activity. Mr. Willet states that he served as Mr. Brown's Alcoholics Anonymous [AA] sponsor from 1987 to late 1990 when Mr. Brown's recidivist drinking behavior, and a friendship which Mr. Willet states became too personal to sustain his sponsorship of Mr. Brown, resulted in a termination of the sponsorship. Mr. Willet generally stated that the appellant and Mr. Brown expressed affection for each other beginning during Mr. Brown's inpatient stay at the St. Cloud Medical Center in 1988. Mr. Willet stated that after a late October 1988 dance sponsored by AA known as a "Roundup," Mr. Brown asked to be dropped off at

the appellant's residence where he claimed to be staying that weekend, and that he complied with Mr. Brown's request. Mr. Willet also stated that he picked Mr. Brown up at a corner near the appellant's residence on a few occasions while he was an inpatient at the Domiciliary. Mr. and Mrs. Willet stated that Mr. Brown and the appellant talked to each other frequently on the telephone over the weekends when he visited them while he was in the Domiciliary. *See* Agency file tab 4s.

As noted, Mr. and Mrs. Willet were unable to state whether Mr. Brown's relationship with the appellant had advanced to a sexual relationship during the period of his inpatient stay at the Domiciliary. When asked if Mr. Brown had stated that his asserted intimacy with the appellant had reached the point of sexual activity, Mr. Willet specifically stated that "[Mr. Brown] never said anything to me about that." He also admitted that he never saw the appellant accompany Mr. Brown on any occasion while Mr. Brown was in the Domiciliary. *See* Agency file tab 4s. The Willet's statement does not show that they witnessed any overt act on the part of the appellant to advance her relationship with Brown when he was an inpatient.

At the conclusion of his interview with agency investigators, Mr. Willet stated that "at one time" the appellant "mentioned" that she "had to buy [Mr. Brown] liquor to keep him calmed down for whatever reason." He further stated that the appellant "affirmed purchased [sic] him a bottle of hard liquor," and that "she said she had gotten him some booze." *See* Agency file tab 4s. Although Mr. Willet states that he subsequently reported the alleged relationship between Brown and the appellant to the Ms.

Krawchuk and Dr. Williams in 1989 or 1990, Mr. Willet offered no information to show that he reported at any time to Dr. Williams, or to any other person at the agency's treatment center, the appellant's alleged statement that she furnished hard liquor to Mr. Brown.

The Willet's [sic] claim that they reported the appellant's alleged intimacy with Mr. Brown in 1989 or 1990 appears inaccurate insofar as Ms. Krawchuk recalls that the only investigation conducted on the matter was based on the Willet's [sic] complaint. Dr. Williams recalls that that investigation was conducted by him in November or December 1988. Moreover, I find implausible Mr. Willet's claim that the appellant admitted purchasing hard liquor for a former alcoholism patient of the agency's treatment facility since he, and the agency, provided no information to show that he ever reported this asserted action which would have had a far more direct bearing on Mr. Brown's sobriety than his asserted intimate relationship with the appellant. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 461-62 (1987). The inaccuracy of Mr. and Mr. Willet's recollection of their complaint to Ms. Krawchuk, and the implausibility of Mr. Willet's assertion that the appellant admitted that she purchased hard liquor for Mr. Brown diminishes, in my judgment, the probative value of the Willet's [sic] statement concerning the appellant's asserted contacts with Mr. Brown during the period April through November 1989 when Mr. Brown was an inpatient at the agency's St. Cloud facility.

The appellant's statements concerning the evolution of her relationship with Mr. Brown are more specific and consistent than the general and inconsistent statements provided by Mr. Brown. *See Hillen v. Department of the*

Army, 35 M.S.P.R. at 460-61. The appellant has consistently and emphatically denied that her relationship with Brown became intimate during his inpatient status at the Domiciliary in 1988. She has described in detail physical contacts, all initiated by Mr. Brown, both at the Domiciliary and at her residence which she claims to have resisted while he was an inpatient. These included an incident when he kissed her in his room and another when he appeared late at night at her residence, pushed his way into her residence, and unsuccessfully attempted to undress her while he was on a weekend pass. *See* Record tabs 1 and 9. Apart from stating that it took her until 3:30 or 4:00 a.m. on the one occasion when he entered her residence to persuade him to leave, she denies that she allowed Mr. Brown any interpersonal or sexual contact with her during his 1988 inpatient status at the Domiciliary.

I find the agency's allegation that the appellant entered an intimate relationship with Mr. Brown while he was an inpatient at the St. Cloud facility is not supported by preponderant evidence. I further find that the agency has not shown by sufficient evidence that the appellant's admitted sexually intimate relationship subsequent to his November 1, 1988 discharge began during a time when he was either an inpatient or outpatient at the agency's St. Cloud facility. In this regard I note that the statement from agency witness Richard Olson confirms the appellant's testimony that Mr. Brown was a patient at a local treatment facility other than the agency's St. Cloud Medical Center in late 1989 when the appellant served as Mr. Brown's "concerned Person." *See* Agency file tab 4v. I, accordingly, find that the agency's first charge against the

appellant, as it relates to her personal relationship with Mr. Brown as a patient at its St. Cloud facility, is not sustained.

Concerning the agency's second specification under charge one, I find insufficient probative evidence on this record to rebut the appellant's specific statement that Mr. Brown purchased "Home Interior" products from her sister, not from the appellant, in October 1989 at a time when he was not an inpatient of the St. Cloud Medical Center. Moreover, I find that the agency has produced insufficient evidence on this record to show whether Mr. Brown was a patient at the facility at that time. Mr. Brown's own statement that he purchased $68.00 worth of home care products "thru" the appellant is insufficient to show that these products were purchased from the appellant and not her sister. *See* Agency file tab 4j. I, accordingly, find that the agency has failed to support this aspect of its second specification by preponderant evidence.

Moreover, although the appellant admits that she was providing a room to a current out-patient Terry Neely in exchange for home maintenance and repair work at her residence, the agency has provided insufficient evidence from Mr. Neely that he entered into his living arrangement with the appellant at a time when he was either an inpatient or an outpatient at its St. Cloud facility. Mr. Neely's statement, in fact, shows that he arranged to stay at the appellant's residence at a time after he was discharged as an inpatient and after his private project in operating a "dry house" for recovering alcoholics failed. *See* Agency file tab 4q. According to Mr. Neely's and Ms. Krawchuk's statements, the question of

Mr. Neely's living arrangements with the appellant arose when he was considering readmission as an inpatient at the St. Cloud facility. The agency has produced insufficient information to show that Mr. Neely obtained his room from the appellant while he was under outpatient care at the St. Cloud Medical Center. I, accordingly, find that the agency has failed to establish its factual specification that the appellant engaged in an improper financial relationship with Mr. Neely while he was a patient at its St. Cloud facility.

The agency's falsification charge is not sustained

In order to establish its falsification charge, the agency must establish by preponderant evidence that the employee knowingly imparted false information with specific intent to defraud or mislead the agency. *See Howard v. Department of Treasury*, 46 M.S.P.R. 492, 494 (1990). Specific intent may be inferred when the misrepresentation is made with reckless disregard for the truth, or with the conscious purpose of avoiding learning the truth. *See Riggin v. Department of Health and Human Services*, 13 M.S.P.R. 50, 53 (1982), No. 82-1818 (4th Cir. August 22, 1983) (Table). Moreover, intent is a state of mind which is generally proven by circumstantial evidence. *See Filson v. Department of Transportation*, 7 M.S.P.R. 125, 132 (1981).

I do not find that the agency has established, by preponderant evidence, that the appellant's relationship with Mr. Brown was intimate at a time when he was an inpatient or an outpatient at its St. Cloud facility. I, accordingly, find that the agency's specification under section A. of its second charge is not sustained.

I further find that the statement provided by Mr. and Mrs. Willet in 1991 that the appellant frequently called Mr. Brown while he was at their residence on weekends when he was otherwise a patient at the Domiciliary in 1988 is not sufficiently accurate or plausible to sustain the agency's specification that the appellant falsely denied making such calls. In this regard, I note that the recollection of the Willets as to the year in which they raised their complaint about Mr. Brown's relationship with the appellant appears to be inaccurate based on the statements of Ms. Krawchuk and Dr. Williams as to their investigation of the complaint. Although Mr. Willet initially stated that Mr. Brown visited at his residence only when he was a patient at the Domiciliary, Mr. Willet later stated that Mr. Brown would show up, presumably at his residence as well as at his work location, when Mr. Brown had mood problems associated with his drinking and his relationship with the appellant. The appellant may, indeed, have contacted Mr. Brown at the Willet's residence on several occasions. I do not find, however, that the Willets' recollection of the timing of events surrounding Brown's relationship with the appellant, and particularly their own involvement in reporting that relationship to the agency's treatment center, is sufficiently reliable to find that they now accurately recall that the appellant's phone calls were frequent or made while Mr. Brown was an inpatient of the Domiciliary.

I have also found implausible and, hence, not credible, Mr. Willet's recent statement that the appellant stated that she had purchased hard liquor for Mr. Brown. I, accordingly, find that the agency's specifications B. and E. that the appellant falsely denied making phone calls to

Mr. Brown and purchasing liquor for Mr. Brown are not sustained.

Concerning specifications C, I have found that the appellant's sister, not the appellant, sold "Home Interior" products to Mr. Brown at a time when he was not an inpatient at the agency's facility. I otherwise find insufficient evidence on this record to support a finding that the appellant ever sold any such products to any other inpatient of the facility. I, accordingly, find that this specification is not sustained.

Concerning specification D. I find that during the agency's investigation, the appellant initially did not clearly deny that she called anyone regarding Mr. Brown's medical condition when she discovered Mr. Brown at his residence in an intoxicated condition on Thanksgiving weekend in 1988. Her response to the question whether she had made such a call, "I don't think so," appears to reflect a failure of her memory, not any intent to mislead the agency. Later she stated that she did not remember making such a call. She did specifically deny making a call to Mr. Brown's AA counselor concerning Mr. Brown's condition that weekend. Mr. Willet claims that the appellant did call him that weekend concerning Mr. Brown's condition. Although such a call may have been made to Mr. Willet, I do not find that the agency has produced sufficient evidence to show that the appellant intentionally falsified her response to agency investigators about making such a call to mislead them about any material fact in its investigation. I, accordingly, do not find that this specification is sustained.

Concerning specification F., Dr. William's statement shows that his inquiry into Mr. Brown's relationship with the appellant appears to have been made in December 1988, not December 1989 as stated in this specification. Moreover, I do not find credible Mr. Brown's assertion in his statement to agency investigators that the appellant asked him to conceal his relationship with her. This statement was apparently made after his current wife became upset with his treatment regime in Kennic Falls, and he was asked to explain why he, personally, did not confirm his relationship with the appellant when he was asked about it in a previous agency inquiry. I, accordingly, do not find that this specification is sustained.

Finally, the appellant has maintained that several years prior to Mr. Brown's admission to the St. Cloud Medical Center she once, briefly, met Mr. Brown in a bar in North Dakota. Mr. Brown now denies that this meeting occurred, although he indicates in his statement that he once told Dr. Williams that he had previously met the appellant in North Dakota. At no time has the appellant alleged, however, that she had any ongoing personal relationship with Mr. Brown until after his discharge as an inpatient on November 1, 1988. Accordingly, I find no basis for finding that the appellant intended to falsify her statement or mislead the agency by claiming that she had such a momentary contact with Mr. Brown at a remote time in the past. I, accordingly, do not find that specification G. is sustained by preponderant evidence.

Based on the foregoing, I find that the agency's charges in the instant case are not sustained by preponderant evidence. The agency's action must, accordingly, be REVERSED.[1]

DECISION

The agency's action is reversed.

ORDER

The agency is ORDERED to cancel the removal and to retroactively restore appellant effective September 26, 1991. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

The agency is also ORDERED to issue a check to appellant for the appropriate amount of back pay, with interest and benefits in accordance amount of back pay, with interest and benefits in accordance with the Office of Personnel Management's regulations no later than 60 calendar days after the date this initial decision becomes final. Appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency to help it comply.

If there is a dispute about the amount of back pay due, the agency is ORDERED to issue a check to appellant for the undisputed amount no later than 60 calendar

[1] The appellant raised no affirmative defenses to the agency's action.

days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office to resolve the disputed amount.

The agency is further ORDERED to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant should ask the agency about its efforts to comply.

INTERIM RELIEF

If a petition for review is filed, I ORDER the agency to provide interim relief to appellant in accordance with Section 6 of the Whistleblower Protection Act of 1989, U.S.C. § 7701(b)(2)(A). The relief shall be effective upon the issuance of this decision and will remain in effect until the decision of the Board becomes final.

FOR THE BOARD:

/s/ Gregory A. Miksa
Gregory A. Miksa
Administrative Judge

No. 96-1395

In The

Supreme Court of the United States

October Term, 1996

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

LESTER E. ERICKSON, JR., ET AL.,

Respondents.

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

HARRY R. MCMANUS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR RESPONDENT ERICKSON

PAUL E. MARTH
Counsel for Respondent Lester E. Erickson
FORMAN, MARTH, BLACK & IDDINGS, P.A.
235 N. Greene Street
P. O. Box 2020
Greensboro, NC 27402-2020
(910) 378-0172

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

WHETHER THE DUE PROCESS CLAUSE ALLOWS FEDERAL AGENCIES TO CHARGE AN EMPLOYEE WITH FALSIFICATION WHEN SUCH EMPLOYEE SIMPLY DENIES ALLEGATIONS OF MISCONDUCT.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

Lester Erickson, a Police Sergeant with the Bureau of Engraving and Printing, was removed from his position for two charges of wrongdoing. Charge 1 was captioned: "Making False Statements in Matters of Official Interest" and concerned Sgt. Erickson's response to an investigation on October 30, 1992.[1] Specifically, the agency was investigating the source of inter-office telephone calls in which the caller would, without identifying himself, laugh madly into the telephone and hang up.[2]

The Agency distributed written questionnaires among members of the police unit, including Sgt. Erickson.[3] To the question, "Approximate the number of occasions you made 'Mad Laugher' calls and to whom by name?" Sgt. Erickson responded, "None." To the question, "Approximate time you quit participating in 'Mad Laugher' calls," Sgt. Erickson responded, "I never participated." To the question, "Specifically, how many times did you ask your subordinates to cease the 'Mad Laugher' calls?" Sgt. Erickson responded, "None, because I do not know who is doing it." Finally, to the question, "Are you willing to specifically state all those that are participants in the 'Mad Laugher' telephone calls?" Sgt. Erickson's response was, "No – I do not know the true identification of the 'Mad Laugher.' In my opinion it is 95% of the police unit (and) also possibly personnel in

---

[1] Respondent Erickson's Appendix, 1a-2a.

[2] Respondent Erickson's Appendix, 3a-6a.

[3] Respondent Erickson's Appendix, 3a-6a.

Production."[4] In fact, other employees were found to have participated in the "Mad Laugher" incidents.[5]

Based on the responses submitted by other members of the police unit, Sgt. Erickson's superior, Carol Williamson, concluded that he had participated in the 'Mad Laugher' caper and that his statements quoted above were false. She further concluded that his conduct violated Section 0.735-55 of the Department's Minimum Standards of Conduct. The standard prohibits employees from uttering or writing false, misleading or ambiguous statements, deliberately or willfully, in connection with an official matter.[6]

In Charge 2, captioned, "Conduct Unbecoming a Supervisor," Sgt. Erickson allegedly urged a co-employee to make a "Mad Laugher" call. Although the employee had not made the call, Sgt. Erickson's conduct was found inappropriate and unacceptable.[7]

After the Administrative Law Judge upheld Sgt. Erickson's removal, he appealed to the Merit Systems Protection Board. The Board denied his petition for review, but reopened the case on its own motion.[8]

The Board began its review with the proposition, stated in *Grubka v. Department of the Treasury*, 858 F.2d 1570, 1574-1575 (Fed. Cir. 1988), that an agency may not

---

[4] Petitioner's Appendix, 52a-53a.

[5] Respondent Erickson's Appendix, 4a-6a, 8a.

[6] Respondent Lester Erickson's Appendix, 3a.

[7] Respondent Lester Erickson's Appendix, 6a, 8a-9a.

[8] *Erickson v. Department of the Treasury*, 63 M.S.P.R. 80 (1994); Petitioner's Appendix, 50a.

charge an employee with falsely denying misconduct when it separately charges him with the misconduct. Charge 1 was not sustained because its essence consisted of Sgt. Erickson's failure to admit his participation in the conduct under investigation.[9]

The Board further found, however, that Sgt. Erickson was never actually charged with the underlying conduct. Charge 1 was concerned with the veracity of his statements while Charge 2 dealt with his encourgement to another employee to initiate a "Mad Laugher" call. Neither charge gave Sgt. Erickson notice that he was charged with "Mad Laugher" calls. Consequently, the Board disregarded the agency's allegation that Sgt. Erickson made the calls. The *Initial Decision*, sustaining Charge 1, was therefore reversed.[10] The Board sustained Charge 2, but mitigated the penalty to a fifteen day suspension.[11]

The Office of Personnel Management then appealed this decision to the Federal Circuit Court of Appeals. Several cases involving charges of falsification were then consolidated. The Federal Circuit, in *King v. Erickson*, 89 F.3d 1575 (Fed. Cir. 1996),[12] affirmed the Merit System Protection Board's decisions. Following denial of its petition for a hearing and suggestion for a rehearing *en banc*,[13] the Office of Personnel Management petitioned

---

[9] Petitioner's Appendix, 52a-53a.

[10] Petitioner's Appendix, 53a-54a.

[11] Petitioner's Appendix, 54a-55a.

[12] Petitioner's Appendix, 1a-23a

[13] Petitioner's Appendix, 108a-109a

this Court for a writ of certiorari, which this Court granted.

SUMMARY OF THE ARGUMENT

By virtue of their property right in employment, federal employees possess an entitlement to minimum due process procedures, which consist of notice and a meaningful opportunity to respond, prior to deprivation of their interest. Both prongs of this "entitlement" are impacted herein. First, Sgt. Erickson was never charged with the underlying misconduct, i.e. making the "mad laugher" phone calls. Consequently, as correctly noted by the Merit Systems Protection Board, he lacked notice of the charge against him. Secondly, if federal agencies, may, as the result of an employee's "response," charge the employees with falsification and thus boost the alleged misconduct to a level which warrants a property deprivation, there is a risk of erroneous deprivation and a subsequent chilling of an employee's right to a meaningful response.

The Federal Circuit's prior decision in *Grukba v. Department of the Treasury, supra,* illustrates an erroneous deprivation as a result of a falsification charge. Therein, the Court concluded that charging the employee with falsification, based on his denial of misconduct, violated his procedural due process rights. It was the addition of the falsification charge that boosted the totality of the alleged misconduct to a level which implicated due process protections.

King v. Erickson, supra, held that a threatened falsification charge effectively thwarts the employee's right to respond and is therefore, improper. Federal employees, aware of the risk of a falsification charge and its attendant consequences, would feel coerced into admitting facts consistent with the government's case. Faulty memories, or divergent perceptions, could too easily turn credibility determinations into falsification charges.

The Federal Circuit cautioned, however, that a right of denial of misconduct does not equate to a right to lie or affirmatively mislead an agency. Beyond the narrow right to deny the specific facts and underlying legal basis constituting the charge, an employee has no right to invent stories or tamper with evidence. The Federal Circuit clearly stated that such conduct provides the basis for falsification or related charges.

Despite Petitioner's contention that the Federal Circuit has created an "expansive right to lie" (*Brief for the Petitioner*, p. 19) among federal employees, the Merit Systems Protection Board, to which federal employees may appeal adverse actions, has since sustained penalties for affirmative misstatements, or "lies." *Kirkpatrick v. United States Postal Service*, 74 M.S.P.R. 583 (1997). The only response to which *Erickson* extends protection is a denial of misconduct and the Board has adhered to this rule.

Petitioner's reliance on *United States v. Dunnigan*, 507 U.S. 87 (1993) and an array of other criminal cases is misplaced. *Dunnigan* found that enhancing a sentence for perjury was constitutionally permissible where the alleged perjury met all elements of the perjury statute, 18

U.S.C. § 1621. Trial courts were directed to make specific findings of fact on each element of perjury prior to enhancing a sentence. There are significant differences between post-conviction enhancement and pre-hearing investigation which Petitioner's argument overlooks.

Use of a criminal law model to analyze what due process is owed to federal employees at the pre-deprivation level is inappropriate. Each of the criminal defendants in Petitioner's cases were tried before independent, non-partial fact-finders. Each was convicted either of an underlying offense, or a perjury charge, on a standard of evidence that requires proof beyond a reasonable doubt.

In contrast, when federal employees face charges of misconduct, the employing agency investigates the facts, formulates the charges and initially, adjudicates guilt or innocence. While federal employees have a panoply of post-deprivation rights in the event they file appeals, the issue of an employee's right to a meaningful response must be viewed from the perspective of what due process is owed in the pre-deprivation setting.

Further, agency officials are under no compulsion to determine facts by any particular standard of proof, other than the statutory standard that an adverse action must occur "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513. They can rely on a preponderance of evidence, little evidence, or no evidence.[14] A "not guilty" plea in a criminal case does not subject the

---

[14] See *Grubka v. Department of the Treasury, supra*; *Erickson v. Department of the Treasury, supra*; and *Greer v. United States Postal Service*, 43 M.S.P.R. 180 (1990).

criminal defendant to a perjury charge and he is not deprived of his liberty until an offense has been proven beyond a reasonable doubt. In contrast, in *Erickson* and its companion cases, the denials of misconduct themselves triggered the property deprivations.

Finally, there is no requirement that agency officials set forth detailed findings of fact in order to sustain falsification charges. In short, the various protections that have been built into the criminal law system do not exist at the pre-deprivation level of federal employment. The gaps between Petitioner's criminal law analogy and the actual circumstances of federal employment only serve to beg the question as to what minimum due process procedures are owed in order to afford a federal employee a meaningful right to respond at the pre-deprivation level. This Court has held that the employee's opportunity to present his side of the story, prior to deprivation of his property interest, is an essential due process requirement.[15]

Due process is a flexible concept which calls for such procedural protections as the particular situation demands. *Gilbert v. Homer*, 117 S. Ct. 1807, 1818 (1997). To determine the scope of procedural due process protections, three factors must be balanced: (1) the private interest that will be affected by the official decision; (2) the risk of an erroneous deprivation through the procedures used and the probable value, if any, of additional

---

[15] *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545 (1985).

or substitute safeguards; and (3) the government's interest. *Gilbert v. Homer, supra,* at 1812.

This Court has accorded significant weight to an employee's private interest in retaining employment. Deprivation of a livelihood is a severe penalty. *Cleveland Board of Education v. Loudermill, supra,* at 470 U.S. 543. As for the risk of an erroneous deprivation, it is undisputed that in all the cases at bar, the additional falsification charges resulted in either demotion or termination. Disputed factual scenarios are common and a deciding official's initial determination of credibility often proves to be erroneous. *Grubka v. Department of the Treasury, supra; Greer v. United States Postal Service,* 43 M.S.P.R. 180 (1990).

Petitioner argues that its interests are detrimentally affected by the *Erickson* rule. Yet, in all but one of the cases before this Court (where the employee recanted his earlier denial),[16] the agencies succeeded in proving misconduct by other evidence.

Petitioner repeatedly and incorrectly characterizes *Erickson* as sanctioning an unfettered right to lie. The MSPB's interpretation of *Erickson* clearly shows that it does not characterize the case in that light. *Kirkpatrick v. United States Postal Service, supra.* Petitioner fails to explain how separating simple denials from affirmative false statements is an onerous burden.

Finally, Petitioner's argument that, under *Erickson,* other individuals with other types of property interests

[16] *McManus v. Department of Justice,* 66 M.S.P.R. 586 (1995).

will be given the freedom to lie is beyond the scope of its "Question Presented."

ARGUMENT

King v. Erickson reinforces the federal employee's well established right to notice and opportunity to respond to charges against him. By virtue of 5 U.S.C. § 7513, federal employees possess a property right in their employment within the meaning of the Fifth Amendment to the United States Constitution.[17] This property right entitles federal employees to minimum due process procedures, which, pursuant to *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 546 (1985) consist of notice and a meaningful opportunity to respond. Charging employees with falsification when they deny misconduct can result in an erroneous deprivation of a property interest. This deprivation is amplified in this case as Sgt. Erickson was never charged with the underlying misconduct so his right to meaningful notice of the charge against him was also impaired.

The principle of law enunciated in *Erickson* is not new. The Federal Circuit merely reaffirmed and amplified

[17] 5 U.S.C. § 7512, 5 U.S.C. § 7513. Petitioner questions whether the Due Process Clause protects employees for an adverse action short of termination. *Brief for the Petitioner,* p. 27, footnote 8. As § 7512 enumerates adverse employment actions, including suspensions and reductions in pay, for which an agency must have "cause" to initiate under § 7513, it would appear that federal employees have due process protection for at least those adverse actions listed in § 7512.

its earlier decision in *Grubka v. Department of the Treasury, supra*. In *Grubka*, it was alleged that James Grubka, a supervisory employee of the Internal Revenue Service, had grabbed Harriet Novak, an agency recruit, kissed her and had become "sexually aroused." *Grubka v. Department of the Treasury, supra*, at p. 1572. In a subsequent agency investigation, Mr. Grubka was asked if he kissed Ms. Novak on the stairwell. He both denied the charge and executed a written statement to this effect. *Grubka*, at p. 1574.

The Merit Systems Protection Board upheld the agency's decision to demote Mr. Grubka, who then appealed to Federal Circuit Court of Appeals. In addressing the falsification charge, the Court stated as follows:

> The AJ sustained this charge and in doing so found Grubka guilty of making a false statement in a matter of official interest in denying that he kissed Novak in the hotel stairwell by proving by Novak that he did kiss her. In other words, the AJ held by circuitous reasoning that proof by Novak that Grubka kissed her ipso facto proved that his denial was false and therefore, his denial was a separate offense as charged. We do not agree. This was indeed a novel theory. The effect of it is to hold that a denial of a charge itself becomes a separate proven offense if what is denied is proven to be true. We have found no case, and no case has been cited to us 'hat approves such a theory. It has always been the rule and practice that a person charged with an offense can deny the charge and plead not guilty, either because he is not guilty or to force the charging party to prove the charge, and, regardless of the outcome, the

> denial is not itself a separate offense. Otherwise, a person could never defend himself against a charge, even though frivolous, for fear of committing another offense by denying the charge. The decision of the AJ denied Grubka his due process rights in that it denied him the right to a trial on the charge without due process of law . . . We hold that the charge has no substance, is frivolous and the decision of the AJ sustaining it is not supported by substantial evidence and is erroneous as a matter of law.[18]

As in *Erickson*, it was the falsification charge itself that boosted the other charges to a level of misconduct warranting a significantly greater penalty.

In *King v. Erickson*, the Federal Circuit framed the issue as whether due process is threatened by charging employees with falsification after they deny incidents of misconduct. The Court answered this question affirmatively, because in its view, a threatened falsification charge impedes an employee's meaningful opportunity to respond.[19] The Federal Circuit correctly observed that in each case before it, the addition of the falsification charges had augmented the penalties to either removal or demotion. Federal employees, aware of the risk of a falsification charge, would feel coerced into admitting facts in line with those of the government's case. The circumstance of faulty memories or divergent perceptions would too readily transform credibility determinations into falsification charges. The consequent "chilling effect" on federal employees' right to respond would not comport

---

[18] *Grubka, supra*, at pp. 1574-1575.

[19] *King v. Erickson, supra*, at p. 1581.

with their due process rights.[20] While it is naturally easier for an agency to prove misconduct with the leverage of a threatened falsification charge, due process requires allowing an employee to deny both the charge and its underlying facts without risk of the falsification charge.[21]

The Federal Circuit cautioned that a right of denial does not equate to a right to lie or affirmatively mislead an agency. Beyond denial of the specific facts forming the charge, the employee had no right to invent stories, or tamper with evidence. Engaging in such conduct provides the basis for a falsification charge.[22] The Federal Circuit explicitly distinguished cases raised by OPM where the employees were charged with altering documents to conceal their misconduct.[23]

In support of its assertion that the Federal Circuit has, in fact, sanctioned an "expansive right to lie" (*Brief for the Petitioner*, p. 13), Petitioner touts the Federal Circuit's subsequent application of its rule to the various cases before it and states that, in fact, the Court sanctioned the very falsification that it had condemned (*Brief for Petitioner*, pp. 20-21). An examination of the facts of each case reveals that the rule was applied appropriately. Barrett and Roberts denied that they had worked on their supervisor's fish pond on government time. The falsification charge against them was reversed, but the charge for

---

[20] *Id.*, at p. 1583.

[21] *Id.*, at p. 1584.

[22] *King v. Erickson, supra*, at pp. 1583-1584.

[23] *Id.*, at pp. 1583-1584.

falsifying their time and attendance reports was upheld.[24] Although Ms. Kye apparently gave differing versions of when she possessed control over her Diners Club card, she consistently maintained that she had not used the card during the time in question. While she articulated a suspicion that her son had used the card, she did not affirmatively state that someone else had used it.[25] Although not addressed by Petitioner, all of Lester Erickson's statements were denials of misconduct. His statement, which he qualified as an opinion, that other personnel were involved in the "Mad Laugher" prank did ultimately prove true. Other employees were found to have been "mad laughers."[26]

Despite Petitioner's contention that "conflicting signals" have been sent to the Merit Systems Protection Board as a result of the *Erickson* decision (*Brief of Petitioner*, p. 21), the Board has not exhibited any difficulty in applying the rule. In *Kirkpatrick v. United States Postal Service*, 74 M.S.P.R. 583 (1997), a postal supervisor removed scrap aluminum from the maintenance facility and sold it to a recycling plant. When questioned about the matter, he replied that a vendor with a contract to collect the scrap had collected it. The MSPB found that this story constituted an affirmative misstatement under *Erickson* and upheld a charge of obstructing an official investigation by providing false information. Conversely in *Jefferson v. United States Postal Service*, 73 M.S.P.R. 376

---

[24] *King v. Erickson, supra*, at pp. 1585-1586; Petitioner's Appendix, pp. 85a-86a.

[25] *King v. Erickson, supra*, at pp. 1585-1586.

[26] Respondent Erickson's Appendix, 4a-7a.

(1997), the MSPB found the ALJ had erred in considering Mr. Jefferson's initial denial of misconduct in the penalty phase of the case. There was nothing in the case to suggest, however, that Mr. Jefferson had made affirmative misstatements about items he had removed from waste mail.

The thrust of Petitioner's argument is that *King v. Erickson, supra* offends this Court's holdings that no provision of the Constitution sanctions a right to lie or commit perjury. In support of such proposition, Petitioner relies primarily on *United States v. Dunnigan*, 507 U.S. 87 (1993).

The question undertaken in *Dunnigan* was whether the Constitution permits a court to enhance a defendant's sentence under Sentencing Guidelines, enacted by Congress, if the defendant commits perjury at trial.[27] Sharon Dunnigan, who testified during her trial, repeatedly denied wrongdoing in the face of overwhelming evidence that she had engaged in cocaine trafficking. U.S.S.G. § 3C1.1 (Nov. 1989) provided for enhancement of a sentence where the defendant willfully impeded or attempted to impede the administration of justice during the prosecution of the offense. The commentary to the statute included untruthful testimony during trial "or other judicial proceeding" as implicating such provision. *Id.*, 507 U.S. at p. 92.

---

[27] Petitioner notes that the Sentencing Guidelines at issue also penalize unsworn false statements that obstruct an investigation, (*Brief for the Petitioner*, p. 23, footnote 6) but *Dunnigan* did not address the constitutionality of this provision.

This Court noted that the Sentencing Guidelines were to determine the appropriate type and extent of punishment after resolution of the issue of guilt. A defendant's perjury was relevant to this inquiry because it reflected on her history, her attitude toward the law and her character in general. *Id.*, 507 U.S. at p. 94.

Nevertheless, to prevent testimony which was the product of mistake or confusion from becoming the source of a sentence enhancement, the Court held that the alleged perjury must meet all the elements of the perjury statute, 18 U.S.C. § 1621. Further, trial courts were directed to make specific findings of fact on each element of the perjury statute prior to enhancing a sentence. *Id.*, 507 U.S. at p. 95. This protection, the Court held, would prevent an automatic enhancement when defendants testify on their own behalf. *Id.*, 507 U.S. at p. 97.

Respondent Erickson disputes Petitioner's contention that *King v. Erickson* creates or sanctions a right to lie. The *Erickson* Court specifically rejected that notion[28] and Petitioner's unremitting characterization of the case as standing for such a proposition is simply intended to be inflammatory. The assumption behind the contention is that when an employee denies misconduct, he is lying.

Beyond the mischaracterization of the *Erickson* holding, use of a criminal law model in analyzing what process is due in this context simply collapses when the model is strictly applied. The defendants in all the criminal cases cited by Petitioner appeared before independent, non-partial fact-finders. All of the defendants were

---

[28] *Id.*, at p. 1583.

convicted of either the underlying offense or a perjury charge that requires proof beyond a reasonable doubt.

Conversely, when federal employees are facing misconduct charges, the employing agency will investigate the facts, formulate the charges, if any, and will adjudicate guilt or innocence. Petitioner is correct that federal employees are afforded full evidentiary hearings before the Merit Systems Protection Board, *Brief for the Petitioner*, p. 18, but these hearings occur *post-deprivation* and are initiated upon an employee's appeal. 5 U.S.C. § 7513 (d). The issue of the employee's right to a meaningful response must be viewed from the perspective of what due process is owed to the employee in a *pre-deprivation* setting. *Cleveland Board of Education v. Loudermill, supra,* at 470 U.S. 541.

Further, agency officials are under no compulsion to determine the facts by any particular standard of proof, other than the general standard that a contemplated action must occur "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513. They can choose to rely on a preponderance of the evidence or little evidence. James Grubka was demoted for falsification, among other charges, when Harriet Novak accused him of kissing her. Lester Erickson was removed, in part, for "making false statements in matters of official interest"; however, he was never even charged with engaging in the misconduct at issue.[29] The deciding official in *Greer v. United States Postal Service,* 43 M.S.P.R. 180 (1990),

---

[29] Petitioner's Appendix, 50a-58a.

accused the employee of falsely denying the misconduct and lying about various factual matters in connection with the misconduct. Although the underlying misconduct was proven, all of the other alleged "lies" proved to be true. The agency official, the M.S.P.B held, had erroneously presumed that the employee had lied about these facts and erroneously considered them in determining the penalty. *Id.*, at p. 189.

The distinction between criminal law and federal employment law is also significant in terms of when the deprivation occurs. Deprivation of an individual's liberty does not occur until after he or she is proven guilty of an offense beyond a reasonable doubt. Up until that moment, the defendant may plead "not guilty," regardless of his actual guilt or innocence. Petitioner cites no cases that stand for the proposition that a defendant risks a perjury charge by pleading "not guilty." After the issue of guilt has been resolved, a defendant's perjury at trial may be considered in enhancing a sentence. *United States v. Dunnigan, supra,* at 507 U.S. p. 94.

In the federal employment cases before this Court, the falsification charges supplanted the actual charges of misconduct, in terms of importance, and became the impetus for property deprivations, regardless of the nature and degree of the underlying misconduct, the proof of the underlying misconduct, or whether the targeted employees were even charged with the underlying misconduct. The denial of misconduct itself formed the basis for the property deprivation.

Finally, none of the agency officials herein set forth detailed findings of fact to sustain a falsification charge

akin to perjury. In short, the various protections that have been built into the criminal law system do not exist at the pre-deprivation level of federal employment. They need not. Pre-deprivation procedures are only intended to be an initial check against erroneous determinations. *Cleveland Board of Education v. Loudermill, supra,* at 470 U.S. pp. 543-545. The gaps, however, between Petitioner's criminal law analogy and the actual circumstances of federal employment only serve to beg the question as to what minimum due process procedures are owed in order to afford a federal employee a meaningful right to respond at the pre-deprivation level. According to this Court's holding in *Loudermill,* the employee's opportunity to present his side of story, prior to deprivation of his property interest, is an essential due process requirement. *Id.,* at p. 545. The question this Court must now answer is whether a federal employee can be punished for telling his side of the story if it differs from the agency's version.

This Court has consistently stated that due process is not a technical conception with a fixed content unrelated to time, place or circumstances. It is flexible and calls for such procedural protections as the particular situation demands. *Gilbert v. Homer,* 117 S. Ct. 1807, 1818 (1997); *Hannah v. Larche,* 363 U.S. 420, 442 (1960). To determine what process is due, three factors must be balanced: (1) the private interest that will be affected by the official decision; (2) the risk of an erroneous deprivation of such an interest through the procedures used and the probable value, if any, of additional or substitute safeguards, and; (3) the government's interest. *Gilbert v. Homer, supra,* at 1812.

This Court has accorded significant weight to an employee's private interest in retaining employment. Deprivation of a livelihood is a severe penalty. *Cleveland Board of Education v. Loudermill, supra,* at 470 U.S. 543. Since, as stated earlier, suspensions for over fourteen days and reductions in grade and pay are included as "actions" for which an employing agency must have "cause" to initiate[30], due process procedures are appropriate for these lesser actions as well. In any event, it is unquestioned that reductions in grade and pay can substantially impact an individual's life.[31]

As for the risk of an erroneous deprivation, it is undisputed that in the cases at bar, it was the additional falsification charges that resulted in either demotion or termination. Once the falsification charges were removed, the remaining charges only warranted letters of reprimand or suspensions. *King v. Erickson, supra,* at p. 1583.[32] As demonstrated above, disputed factual scenarios are common and the deciding official's decision to tack on a falsification charge is often motivated by his or her initial

---

[30] 5 U.S.C. § 7512, 5 U.S.C. § 7513.

[31] See *Grubka v. Department of Treasury, supra,* employee deprived of over $12,000 in income; and *Greer v. United States Postal Service, supra,* employee demoted to position that required him to make 100 mile round trip to and from employment.

[32] See *Erickson v. Department of the Treasury, supra.* Without the falsification charge, Lester Erickson's misconduct consisted of urging a co-worker to make a "Mad Laugher" call and his penalty was mitigated from removal to a fifteen day suspension.

revulsion to the misconduct.[33] The choice faced by the employee is whether to admit misconduct and forego telling his "side of the story" because of the threatened falsification charge or tell his "side of the story" and risk the falsification charge and attendant consequences.

Petitioner is correct that many of the allegedly false statements in these cases were made during investigations, before any charges of misconduct had been formulated. It argues that employees' due process rights are not implicated in agency investigations because these investigations do not adjudicate legal rights and therefore do not deprive employees of their property interests (*Brief for the Petitioner*, p. 26). This statement overlooks the actual process. Charges of misconduct are formulated on the basis of an agency investigation. An employee is deprived of his property interest upon a final written decision issued by the agency. That decision becomes final unless the employee perfects an appeal.[34]

Petitioner argues that the lower court's ruling seriously interferes with the government's right to discipline or remove employees who lie. It cites two cases in support of its argument that "up to the present" (*Brief for the Petitioner*, p. 37), the Merit Systems Protection Board has upheld false statement charges against employees. However, one such case, *Vazquez v. Department of the Justice*, 12 M.S.P.R. 379 (1982) was decided prior to *Grubka*. The only decision of the MSPB after *Grubka* upholding a charge for

---

[33] *Grubka v. Department of the Treasury, supra; Greer v. United States Postal Service, supra.*

[34] 5 U.S.C. § 7513; 5 U.S.C. § 7701; *Grubka v. Department of the Treasury, supra.*

falsely denying misconduct is *Greer v. United States Postal Service, supra*. In that case, the Board distinguished *Grubka* because it found that the facts demonstrating misconduct in the latter case were more equivocal than in the former. In any event, it concluded that many of the alleged false statements were in fact true statements and mitigated the penalty to a sixty day suspension. Other cases cited by the government regarding falsification of documents are not relevant to this proceeding as the Federal Circuit made it clear that such conduct remained subject to disciplinary proceedings.

Petitioner argues that its interests would be seriously affected by adoption of the *Erickson* rule. Government investigators would be misled with an attendant disruption in proceedings (*Brief for the Petitioner*, p. 33). The *Erickson* court noted that the burden is on the employing agency to prove charges of misconduct and it has the means of proving the charges other than through the admissions or denials of the targeted employee.[35] In fact, in all but one of the cases before this Court, the Agency did succeed in proving misconduct by other means.[36]

---

[35] *Id.*, at p. 1584.

[36] *Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586 (1994) (nurse's improper relationship with patient proven by patient's testimony, which was more plausible than nurse's); *Erickson v. Department of the Treasury, supra* (involvement in "Mad Laugher" prank never proven because employee was never charged; however, it was proven that employee encouraged a co-worker in the prank on the basis of the co-worker's testimony); *Kye v. Defense Logistics Agency*, 64 M.S.P.R. 570 (1994) (charges for misuse of a credit card upheld, although supporting evidence not recounted); *Barrett v. Department of the Interior*, 65 M.S.P.R. 186 (1994) (supervisor's and subordinates'

In arguing that agency investigations will be thwarted by *Erickson,* Petitioner again mischaracterizes the rule as affording employees an unchecked freedom to lie (*Brief for the Petitioner*, p. 33). Employees are not free to lie. They will be held accountable for statements that venture beyond the line of denial into outright misstatements of facts. *Kirkpatrick v. United States Postal Service, supra* (penalty of removal upheld in part for falsified statements).

Petitioner cannot show that separating denials of misconduct from false statements is an onerous burden. Its brief avoids any attempt at establishing such a reasonable line by continually characterizing the Federal Circuit decision as conferring a right to lie. Sgt. Erickson is not advocating a right to lie or to provide false information to the government during an investigation. Rather, as part of his Fifth Amendment right to respond to charges against him, he simply seeks the opportunity to deny allegations of misconduct.

Finally, Petitioner appeals to this Court to overturn *Erickson* on the grounds that other individuals with other types of property interests will be given the freedom to lie (*Brief for the Petitioner*, pp. 38-40). Again, Petitioner has mischaracterized the holding. Further, this argument is beyond the scope of Petitioner's "Question Presented" (*Brief for the Petitioner*, pg (I)), which addresses the efficacy of the *Erickson* rule only in the context of federal

---

misconduct in building a fish pond with government equipment on government time proven by several eye-witnesses). In *McManus v. Department of Justice*, 66 M.S.P.R. 586 (1995), the employee recanted his initial denial.

employment. Pursuant to Rules of the Supreme Court of the United States, Rule 24 (1)(a), Petitioner's attempt to raise additional issues is improper.

CONCLUSION

The origin of the rule enunciated in *King v. Erickson, supra* appeared in *Grubka v. Department of the Treasury, supra,* holding due process was violated by charging an employee with falsification when he denies misconduct.

King v. Erickson did not expand this rule into a right to lie. It reaffirmed that property interests entitle employees to a notice of charges and an opportunity to respond prior to deprivation. A right to respond could not be meaningful, the Court held, if an employee was threatened with a falsification charge when he denied misconduct. Accordingly, while an employee may be charged with falsification for affirmative misstatements of fact, he may not be so charged where his response consists of a simple denial of misconduct.

Petitioner mischaracterizes *Erickson* as affording federal employees an "expansive right to lie" and cites numerous criminal cases holding that various constitutional rights cannot shield individuals from the consequences of perjured testimony. These cases are inapplicable, in the first instance, because *King v. Erickson* neither creates nor sanctions a right to lie. Secondly, analyzing what due process procedures are owed to federal employees based on a criminal law model is inappropriate. Protections built into the criminal system do not exist in the civil service setting at a pre-deprivation

level. Due process procedures available at the pre-deprivation level consist of notice of charges and an opportunity to respond. The issue is whether an employee retains a meaningful opportunity to respond if he can be charged with falsification as a result of his response.

In balancing the employee's interest in his employment, the risk of erroneous deprivations, which can and do occur when employees are charged with falsification, and the government's interest, there is sufficient rationale to support the *Erickson* rule. Denials or admissions of misconduct by the suspected employees are not the only means by which agencies prove misconduct. Agencies retain the power to assert charges for falsification when an employee's statements extend beyond denial into affirmative misstatements.

Petitioner argues that due process rights are not implicated in agency investigations since these investigations do not adjudicate legal rights. To the contrary, an agency investigation of an employment matter can result in charges against an offending employee and a subsequent deprivation of his property interest. Unless the employee appeals, the agency's decision is final.

Without a thorough examination of other property interests and the unique circumstances that pertain to them, a prediction as to whether the *Erickson* rule can be expanded to other situations is merely speculative. In any event, the efficacy of the rule in contexts other than federal employment is beyond the scope of Petitioner's "Question Presented."

For the above reasons, Sgt. Erickson respectfully requests that the decision of the Federal Circuit court be affirmed.

Respectfully submitted this 11 day of September, 1997.

/s/ Paul E. Marth
Paul E. Marth
Attorney for Respondent Erickson

(8)

Docket No. 96-1395

IN THE

Supreme Court of the United States

October Term, 1996

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Petitioner,

v.

LESTER E. ERICKSON, JR., ET AL.

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT,

Petitioner

v.

HARRY R. McMANUS, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT KYE'S BRIEF IN OPPOSITION

Neil C. Bonney, Esquire
Counsel for Respondent Sharon Kye
NEIL BONNEY & ASSOCIATES, P.C.
4652-A Haygood Road
Virginia Beach, Virginia 23455
(757) 460-3477

26 pp

QUESTION PRESENTED

WHETHER IT IS PERMISSIBLE FOR A FEDERAL AGENCY TO SEPARATELY CHARGE AN EMPLOYEE WITH MAKING FALSE STATEMENTS DURING AN AGENCY INVESTIGATION WHEN THE EMPLOYEE DENIES THE MISCONDUCT AND THE AGENCY CHARGES THE EMPLOYEE WITH THE UNDERLYING MISCONDUCT.

STATEMENT REQUIRED BY RULE 29.6

The Petitioner has correctly listed the parties to the proceeding. There is no corporation which is a party to this proceeding.

Table of Contents

Table of Authorities

Cases — Page

Statutes — Page

No. 96-1395

In the

Supreme Court of the United States

October Term, 1996

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

LESTER E. ERICKSON, JR., ET AL.

JAMES B. KING, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

HARRY R. MCMANUS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT KYE'S BRIEF IN OPPOSITION

Pursuant to Rule 15 of the Court's rules, Respondent Sharon Kye, respectfully files this brief in opposition to the Office of Personnel Management's Brief for the Petitioner.

CITATIONS OF OPINIONS AND JUDGEMENTS DELIVERED BY THE COURTS BELOW AND NOTICE THAT JURISDICTION OF THIS COURT IS CORRECTLY PRESENTED BY PETITIONER

The decision of the United States Court of Appeals for the Federal Circuit is reported as King v. Erickson, et. al., 89 F3d 1575 (Fed. Cir. 1996). The decision of the Merit Systems Protection Board is Kye v. Defense Logistics Agency, 64 MSPR 570 (1994). Jurisdiction is correctly presented by petitioners.

STATEMENT OF THE CASE

The issue arises from multiple disciplinary proceedings against government employees. In the case of Respondent Kye, the Administrative Judge sustained four of the original six charges of misconduct and upheld Respondent Kye's removal. Pet. App., p. 60a.[1] Respondent Kye appealed to the Merit Systems Protection Board (MSPB or Board), who upheld three of the four remaining charges, but reversed the charge of providing false information in an official investigation, based on *Walsh v. Department of Veterans Affairs*, 62 M.S.P.R. 586 (1994), which followed the ruling of *Grubka v. Department of the Treasury*, 858 F.2d 1570 (Fed. Cir. 1988). Pet. App., p. 64a. The Board also mitigated the

[1]"Pet. App. p. ___" refers to the Appendix filed by Appellant in the Petition for Writ of Certiorari in this case.

penalty from removal to a 45-day suspension, finding it to be "the *maximum* reasonable penalty for the sustained charges." *Id.* (emphasis added). The Federal Circuit affirmed the decision. Pet. App., p. 23a.

REASONS FOR AFFIRMING THE DECISION OF THE COURT OF APPEALS

I. THE DECISION OF THE COURT OF APPEALS REQUIRES THE GOVERNMENT TO ACT WITHIN THE CONFINES OF THE UNITED STATES CONSTITUTION.

The Constitution affords every person in the United States due process before the government can deprive him or her of life, liberty or property. For government employees, due process includes the right to notice and a meaningful opportunity to respond to charges brought against them by the government. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). *See also*, 5 U.S.C. § 7513 (1994). The Petitioner seeks to deny federal employees a meaningful opportunity to respond to charges, arguing that the decision of the Court of Appeals which permits an employee to deny the charges and call for proof creates a right to lie for the employees. Pet. Brief, p. 19. In fact, the holding of the Court of Appeals protects the rights of the employee, under both the fourth and fifth amendments.

The Court of Appeals in *Grubka* applied the term

"plead[ing] not guilty" to the civil employee who denies charges of misconduct brought against him or her by the government. *Grubka*, 858 F.2d at 1575; *See* n. 2 for quote. A criminal defendant who pleads not guilty cannot, based solely on the fact that she pleaded not guilty, be charged with making false statements when she is found guilty by a jury. To allow such "extra" charge would to effectively eliminate the protections of the Fifth Amendment against self-incrimination. The Court in *Grubka* held that requiring an employee to incriminate himself or herself by admitting to the alleged misconduct charged against him or her would require the court "[t]o hold that the rule violates the provisions of the Fifth Amendment to the Constitution against self-incrimination." *Grubka*, 858 F.2d at 1575. This Court has applied the Fifth Amendment self-incrimination protection to civil proceedings, *Id.*, and civil employees are afforded the same protection. Civil employees do not have the right to remain silent; they can be charged with failure to assist in an investigation. However, federal employees have protection against self-incrimination, and requiring them to admit to misconduct or face additional charges is thus violative of the Constitution.

II. THIS COURT HAS NEVER ALLOWED THE GOVERNMENT UNRESTRICTED RIGHTS REGARDING STATEMENTS MADE DURING INVESTIGATIONS.

Petitioner misstates the question presented to the Court. The question is not whether or not the government can **sanction** an employee for making false statements, but whether or not the sanctions can come in the form of a **separate charge** from that of the underlying offense.

Petitioner cites *United States v. Dunnigan*, 507 U.S. 87 (1993) as precedent for upholding the government's right to charge the employee with both charges. Pet. Brief, p. 23. However, *Dunnigan* is a criminal case in which the defendant was found guilty of perjury and the sentencing guidelines provided an increased sentence for the underlying offense based on finding the defendant guilty of perjury. *Dunnigan*, 507 at 96 (emphasis added).

Two things should be noted of *Dunnigan*. First, the court was not addressing the situation of an additional, separate charge being brought against the defendant for the false statements. The Court had before it the issue of whether or not a sentence for one offense could be increased based on a finding of perjury. Respondent concedes that whether or not an employee admits to the misconduct is properly addressed when deciding the reasonableness of the penalty imposed by the agency under the factors articulated in *Douglas v.*

Veterans Administration, 5 M.S.P.R. 280 (1981). *See*, Respondent Kye's Brief in Opposition to the Office Of Personnel Management's Petition for Writ of Certiorari, p. 9.

Second, *Dunnigan* addresses statements made under oath which were proven, beyond a reasonable doubt, to be perjury. While the sentencing guidelines which were at issue in *Dunnigan* apply also to statements made during investigations, *See*, Petition, n.6; Pet. Brief, n.6, the application of the guidelines to out of court statements is conditioned on being "materially false . . . that significantly obstruct or impede[] the official investigation or prosecution." *Id.*, citing Guidelines § 3C1.1 & Application Note 3(g). Even in petitioner's "supporting" case, the use of false statements only as a basis for increasing the penalty for conviction of underlying misconduct is not without restraint. There has never been any assertion that the charged false statements by Kye would rise to the level of impeding the investigation.

III. THE PETITIONER MISINTERPRETS THE HOLDING OF THE COURT OF APPEALS AS CREATING A RIGHT TO LIE FOR THE EMPLOYEES.

The Petitioner misinterprets the Court of Appeals' holding that "an agency may not charge an employee with falsification or a similar charge on the ground of the employee's denial of another charge or of underlying

facts relating to that other charge," as creating a "right to lie" for the employee. Pet. Brief, p. 13. Such an interpretation is unfounded, and in fact addressed by the Court of Appeals, which held, "[t]his does not mean, however, that an employee has a right to lie." Pet. App., p. 17a. The Court of Appeals separates an employee's right to "deny the charges and the underlying facts" from making "false stories" or "telling tall tales." *Id.* Petitioner argues that the line between the two is indistinguishable. This line is no less distinguishable than the line created by the guidelines at issue in *Dunnigan, supra*. False stories and tall tales are material misrepresentations which significantly obstruct or impede an investigation. Such statements "go beyond denial and defense." Pet. App., p. 17a. The concerns of the Petitioner are addressed by the limitation that only denials of misconduct and the underlying facts are protected from further charges, not statements which go beyond denial and defense. The Petitioner's contention that the ruling would give federal employees "substantial latitude to make false statements" is simply unfounded. Additionally, in the near ten years since *Grubka*, the problem of ambiguity of the right to deny alleged misconduct has not once been an issue in the courts, and has been applied without incident. *See, Beverly v. United States Postal Service*, 136 F.2d 136 (1990) (A second charge for false statements based on a denial of charges dismissed as improper by the administrative judge in initial hearing, affirmed by court of appeals).

In the case of Respondent Kye, the "false statements" of which Kye is accused did not materially nor significantly obstruct or impede the investigation. In fact, the statements by Respondent Kye did not obstruct the investigation into the unauthorized charges at all. The statements did not impede the investigators from gathering independent information about the charges and establishing where, when and how the charges were made. Respondent Kye stated that she had not made the credit card charges, and did not have the card in her control when the charges were made. This statement did not lead the agency investigation on any avenues other than those which it would have otherwise pursued: investigating when the charges were made; obtaining all information about the charges from the establishments at which the charges were made; determining what the charge amounts were. In fact, the agency was able to obtain signature information on one of the charges which led to the Board sustaining one of the misconduct charges against Respondent Kye.

Petitioner further argues that to allow an employee to make false statements in the form of a denial of charges is inconsistent with holding an employee responsible for making false statements about another employee in the course of an investigation. Pet. Brief, p. 22. However, in the case of an employee who makes false statements about another employee, the statements rise to a material level, and obstruct the investigation. If the employee points blame at an employee he or she knows to be innocent of the alleged misconduct or away from an employee he or she knows to have committed the misconduct, the investigation is impeded and

obstructed away from the guilty employee. Also, in the case of investigating another employee, there are no concerns with violating a person's rights against self-incrimination.

IV. THE DUE PROCESS RIGHTS OF THE EMPLOYEES ARE JEOPARDIZED BY APPELLANT'S POSITION.

A federal government employee has a property interest in his or her employment with the government, and as such, the federal government must provide due process to its employee before terminating him or her. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *See also*, 5 U.S.C. § 7513 (1994). Government employees are entitled to, among other things, an opportunity to respond to the charges on which the government has based a decision to terminate. 5 U.S.C. § 7513(b) (1994). The Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), held the opportunity must be meaningful, not merely pretextual. *Id.* at 546. The Petitioner argues that procedural due process is not at issue in charging an employee with both the misconduct and the false information charges. However, the Court of Appeals in the case at bar, relying on *Grubka*, held in order to protect the employee's meaningful opportunity to respond to charged misconduct, an agency cannot charge an employee with making false statements during an agency

investigation when the employee denies the misconduct and the agency charges the employee with the underlying misconduct. Pet. App., p. 21a.

To allow the agency to charge an employee with both charges any time he or she denies the charged misconduct, effectively and automatically creates a second charge, unless the employee admits to the misconduct with which he or she is charged. Pet. App., p. 17a, 29a. Thus, any time an employee contests an agency's action or articulates a different version of truth than the agency's version, that employee risks an additional or subsequent falsification charge if every factual finding (based on a mere preponderance) is not resolved as she asserts. The charge of falsification is of such magnitude and potential penalty that few employees would risk the consequences, which include termination, for the sake of availing themselves of their right to respond to the misconduct charged against them. As such, the employee's right to respond to charges would no longer be meaningful, a violation of the Constitution and the employee's procedural due process rights would be constructively denied.

The Petitioner would have the Court believe that employees have nothing to fear because only valid charges are brought, and if the employee is telling the truth, then the underlying charges will not be sustained. This theory decries the basis for the country's entire justice system. Investigation of past events is not a perfect science; mistaken identification, misinformation and accusing the innocent occur on a daily basis. In addition, individuals might have a technical basis for

denying a suspiciously or unfairly worded agency charge and requiring proof on the allegation. It is for these reasons that our justice system holds the accused innocent until proven guilty and allows the accused to plead not guilty, thereby forcing the accuser to prove guilt.[2]

The level of proof required of the agency is by a preponderance of the evidence before an administrative judge with different rules of procedure and evidence than in a regular court. It is the agency's duty to present enough evidence to support the burden. Not allowing an employee to deny allegations of misconduct would place the employee in the position of assisting the agency in proving the charges against her while at the same time trying to defend against the charges. Such a position is irrational and illogical.

The Petitioner also fails to address the type of misstatement of which Respondent Kye stands accused. The false information she was charged with centered around the date upon which she regained control of her

---

[2] "A person charged with an offense can deny the charge and plead not guilty, either because he is not or to force the charging party to prove the charge. Otherwise, a person could never defend himself against a charge, even though frivolous, for fear of committing another offense by denying the charge." *Grubka*, 858 F.2d at 1575. *Grubka* involves a federal employee who was accused of misconduct, denied the misconduct, gave an explanation of what happened, and was subsequently charged with making false statements during an agency investigation. The charge was dismissed by the court of appeals. *Id.* The facts in *Grubka* are analogous and nearly on point to the facts before the Court today.

government issued Diner's Club card. Pet. App., p. 22a, 23a. Respondent admitted that she was confused as to when she was in control of the card and the date on which she destroyed it. Respondent tried to correct the misstatement during the course of the investigation. Under the theory set forth by the Petitioner, an innocent misstatement by an employee upon being confronted with charges, regardless of subsequent efforts to assist in the investigation or correct the error, could result in termination of the employee. As previously stated, such potential for serious consequences would "chill" an employee's right to respond to charges (except by way of admitting to them), a right which is guaranteed by the United States Constitution and would further prevent them from correcting errors which later come to light through additional information for fear of a removal action.

V. PETITIONER INADEQUATELY APPLIES THE *MATTHEWS V. ELDRIDGE* TEST.

Appellant repeatedly cites the test which is used to determine whether governmental procedures adequate protect an employee's due process rights:

> **First**, the private interest that will be affected by the official action; **second**, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or

> substitute safeguards; and **finally** the Government's interest.

Gilbert v. Homar, 117 S.Ct. 1807, 1812 (1997) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). However, Petitioner never adequately applies the test to all aspects of this case.

A. Federal employees' property interest in continued federal employment is at great risk if they lose the right against compelled self-incrimination during investigation of alleged misconduct.

As stated before, Petitioner would have the Court believe that there is no risk associated with the charging of federal employees for making false statements during investigations along with charging them with the underlying charge. However, as held by the Court of Appeals, allowing the government to do so would create a chilling effect on the employees' exercise of due process rights. In essence, every charge would become a potential removal situation. The most minor of offenses would be open to the addendum of a second charge of making false statements, which would carry a far greater penalty, including removal. Therefore, even the employee charged with stealing a pencil would be subject to removal if she denied the charge. Because Petitioner seeks to make this a separate charge,

independent from the underlying charge, the employee is subject to removal regardless of whether the underlying charge is mitigated or not.

While it may be true (as Petitioner asserts) that criminals may not be compelled to falsely self-condemn, the stakes for criminals are different than for employees. As in the example cited above, the penalty for stealing a pencil may be relatively inconsequential, whereas the penalty for making false statements could be removal. An accused criminal does not face such a dichotomy of penalties. If the criminal self-incriminates, there is still the threat of a great intrusion into his or her life, whether by probation, negative public records, trouble with future employment opportunities, limits of social freedom for a period of time, and the like. The risk of trying to prevail on the underlying charge is not increased by the inclusion of the false statements charge; the resultant degree of penalty is. For an employee, the decision whether or not to deny the charge can be all or nothing; remain employed by admitting the alleged misconduct or risk removal by defending oneself. For an accused criminal, the decision is a matter of how much of a penalty, which is certain, is she willing to endure.

B. The Value of Additional Procedures Far Outweighs The Costs.

The only cost for the government associated with the restraint against charging the employee with separate charges for making false statements during an

investigation is having to honor the rights of the individual as set forth by the Constitution.

As previously stated, there is no question that whether or not the employee made false statements is a part of the determination of appropriate penalty under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). The statements are usable in determining appropriate penalty within the predetermined range for the underlying offense. What Petitioner seeks to be able to do is to go beyond the scope of the predetermined appropriate penalties by using the statements as a separate charge, carrying their own range of penalties. The government is required to prove the underlying offense; at that point, the statements are used to determine an appropriate penalty.

Conversely, what the restriction would do is disallow the government from terminating an employee for a minor misconduct based on his or her defense against such charge. Surely the cost of not doing so is far outweighed by the potential increase in administrative costs as employees are forced to fight false statement charges through the administrative grievance procedure so as to maintain their employment as a result of defending themselves against frivolous and minute acts of misconduct.

C. The Government's Interest Would Best Be Served by Such a Restriction.

One of the government's interests presumably is to avoid inefficiency in the management of its employers. As previously stated, allowing the government to charge separately for statements made during an investigation opens every investigation of employee misconduct into a potential removal case. Undoubtedly an employee will fight hardest to keep his or her job. Therefore, every disciplinary action would be a potentially long, involved and expensive administrative process as the employee sought to exhaust every possible avenue of relief. The cost of using the statements as a mitigating factor as opposed to the cost of using the statements as a separate charge are on such opposite ends of the spectrum that they are nearly unable to be compared. There is no question the benefit of the restriction far outweigh the costs, and the interest of the government is best served by such restrictions.

VI. PETITIONER EMBARKS DOWN THE SLIPPERY SLOPE, ADDRESSING ISSUES NOT PRESENTLY BEFORE THE COURT.

Petitioner asserts that should the Court uphold the ruling of the Court of Appeals, it will effectively hold unconstitutional other disciplinary systems. Pet Brief, p. 38. Such is not the case. The only issue before the Court is the decision of the Court of Appeals and its impact on the federal government's disciplinary

procedures. Whether or not state or local public employees have been treated fairly is NOT at issue. Moreover, just because other systems use similar methods as those proposed by petitioner in this case does not automatically mean they are correct or constitutional. As established in *Washington v. Harper*, 494 U.S. 210 (1990), "[t]he procedural protections required by the Due Process Clause must be determined with reference to the rights and interest at stake in the particular case." *Id.* at 229. Petitioner attempts to cloud the issue of the case at bar by creating a slippery slope analysis to address other entities' disciplinary processes.

In as much as the cases and scenarios cited relate to the present case, each involves actions delineated by the Court of Appeals as more than "a den[ial of] the charges and the underlying facts," falling outside the protection afforded by the decision of the Court of Appeals.

The decision of the Board and the Court of Appeals is based on sound precedent, Constitutional principles, and administrative procedure principles. No negative examples of the application of this rule have been cited since *Grubka* and there is no need for a change in the current state of the law. There are no unjustified constitutional restraints on the government when it is required to afford its employees the same rights protected by the Constitution to other accused persons, whether in a criminal or civil context. The procedural restraints, when balanced against the costs of implementing the restraints, are valuable far beyond any

cost associated with them. As such, the interests of both the employee and the government are best served by not allowing the government to separately charge the employee with making false statements regarding allegations of misconduct.

CONCLUSION

The decision of the Court of Appeals should be AFFIRMED.

Respectfully submitted.

NEIL C. BONNEY
Counsel of Record for Respondent Kye
NEIL BONNEY & ASSOCIATES, P.C.
Attorneys and Counsellors at Law
Haygood Office Buildings
4652-A Haygood Road
Virginia Beach, Virginia 23455
(757) 460-3477

SEPTEMBER 1997

(9)

No. 96-1395

In the Supreme Court of the United States

OCTOBER TERM, 1997

JANICE R. LACHANCE, ACTING DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

LESTER E. ERICKSON, JR., ET AL.

JANICE R. LACHANCE, ACTING DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

HARRY R. MCMANUS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

SETH P. WAXMAN
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

18 pp

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-1395

JANICE R. LACHANCE, ACTING DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

LESTER E. ERICKSON, JR., ET AL.

JANICE R. LACHANCE, ACTING DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

HARRY R. MCMANUS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondents fail to identify a single court, other than the court below, that has in any context recognized a constitutional right to make false statements. They acknowledge, as they must, that this Court has repeatedly refused to recognize any such right. They nevertheless defend the ruling of the court below,

making two principal arguments. First, they contend that this Court's decisions refusing to recognize a constitutional right to make false statements are distinguishable, because those decisions all involved criminal proceedings. Second, they argue that the ruling of the court of appeals extends only to "mere denials" of a charge of employment misconduct, or of the facts underlying such a charge, and that such denials are not false statements.

These contentions are without merit. First, there is no basis in this Court's cases, or in logic, for confining to criminal proceedings the principle that the Constitution confers no right to lie. Second, denials—even "mere denials"—are undoubtedly false statements, and the court of appeals' disposition of the present cases belies respondents' efforts to characterize the court's ruling as narrow.

1. In our opening brief (at 22-25), we cited a dozen cases in which this Court has refused to recognize a constitutional right to make false statements. Although respondents attempt to distinguish these cases on the ground that all involved criminal proceedings, this proposed distinction is unavailing. There are differences between criminal proceedings and federal employee-discipline proceedings, but those differences reflect the far higher stakes that are involved in criminal proceedings. They do not justify creation of a constitutional right to make false statements in the present context.

a. As respondents point out (Erickson Resp. Br. 15-18; Walsh Resp. Br. 13-14), criminal defendants receive procedural protections—including the requirement that the elements of an offense be proved beyond a reasonable doubt—that are not accorded to employees facing possible discipline. These heightened procedural protections flow entirely from the fact that "[t]he accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." *In re Winship*, 397 U.S. 358, 363 (1970). The Court has refused to provide a constitutional safe harbor for false statements in criminal proceedings, even though defendants face a loss of liberty if their statements are determined to be false. It follows logically that no such safe harbor would be appropriate in employment-discipline proceedings, where what is at stake, though important, is not the "transcending value" of criminal defendants' interest in their liberty. *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958).

Respondents argue, however, that the heightened procedural protections provided in criminal cases substantially decrease any concern that innocent defendants might be chilled in the exercise of their right to be heard at trial. Such defendants, they contend, can confidently exercise their right to testify, because there is little likelihood that they will inaccurately be found to have made a false statement while doing so. Conversely, they further contend, the absence of such protections in the employment-discipline context means that employees facing possible discipline will be coerced into falsely admitting misconduct, afraid that they might otherwise be incorrectly found to have made false statements.[1] *E.g.*, Erickson Resp. Br. 15-18. This argument is meritless.

---

[1] Respondents' argument rests on the premise that the procedural protections accorded to federal employees facing potential discipline are inadequate to protect employees from

First, respondents provide no empirical foundation for their claim that federal employees have been falsely admitting misconduct because they are afraid of erroneous false-statement findings. To the contrary, as we pointed out in our opening brief (at 29), the available evidence suggests that false statements are being insufficiently deterred, not that true statements are being deterred or inaccurately punished.[2] Certainly the six employees involved in the present

---

erroneous determinations that they made false statements. *E.g.*, Kye Resp. Br. 10-11. Respondents do not explain, however, how these procedures could be constitutionally adequate to protect employees from erroneous deprivations of their property interest in continued employment, but constitutionally inadequate to protect employees' right to respond to charges of misconduct.

[2] In making this point in our opening brief, we stated that, up until the present cases, the Merit Systems Protection Board (MSPB) had been consistently sustaining the discipline or removal of employees for making false statements during agency investigations into employee misconduct (Pet. Br. 29, 37). Respondent Erickson disputes this, claiming that "the only decision of the MSPB after *Grubka* [v. *Department of the Treasury*, 858 F.2d 1570 (Fed. Cir. 1988)] upholding a charge for falsely denying misconduct is *Greer* v. *United States Postal Service*, [43 M.S.P.R. 180 (1990)]." Erickson Resp. Br. 20-21. Respondent Erickson is mistaken, because the MSPB issued many such decisions after *Grubka*. See, *e.g.*, *Kane* v. *Department of Veterans Affairs*, 46 M.S.P.R. 203, 208-209 (1990); *Hornbuckle* v. *Department of the Army*, 45 M.S.P.R. 50, 53-54 (1990); *Hill* v. *Department of the Army*, 44 M.S.P.R. 607, 611-613 (1990); *Allen* v. *Department of the Air Force*, 43 M.S.P.R. 192, 195-196 (1990); *cf. Sterling* v. *Department of Defense*, 46 M.S.P.R. 177, 185-186 (1990) (administrative law judge's failure to sustain discipline of employee for making false statement was error, but error was harmless because removal of employee was sustained on other grounds).

cases were not deterred from asserting that they did not commit the charged misconduct.

Second, respondents exaggerate the differences between the present cases and those in which the Court has rejected claims of a constitutional right to make false statements. Of particular relevance are the Court's decisions in *United States* v. *Dunnigan*, 507 U.S. 87 (1993), and *United States* v. *Grayson*, 438 U.S. 41 (1978). In both cases, the Court held that it was lawful for judges to consider at sentencing their conclusion that the defendant had testified falsely at trial. Federal employees facing adverse employment action receive procedural protections that are more extensive than those provided to criminal defendants at sentencing.[3] Moreover, consideration of false statements at sentencing can result in a substantial loss of liberty, while such consideration in employment-discipline proceedings can result, at worst, in job loss.

In *Grayson*, this Court dismissed as "entirely frivolous" the assertion that defendants would be deterred from giving truthful testimony by their fear

---

[3] A tenured federal employee facing a major adverse employment action has a right to a pre-deprivation hearing, a post-deprivation evidentiary hearing before a neutral administrative judge (at which the employing agency will bear the burden of proof by a preponderance, 5 U.S.C. 7701(c)(1)(B)), and extensive administrative and judicial review. Pet. Br. 17-19. At sentencing, a criminal defendant may be entitled to a hearing to resolve material disputes of fact, and the sentencing judge typically applies the preponderance standard when resolving such disputes. Fed. R. Crim. P. 32(c)(1); *United States* v. *Watts*, 117 S. Ct. 633, 637 (1997) (per curiam) (citing Sentencing Guidelines § 6A1.3 comment.). Subsequent judicial review of sentencing determinations is relatively limited. 18 U.S.C. 3742.

of being punished at sentencing. 438 U.S. at 54-55. Because employees facing employment discipline have less at stake and receive more extensive procedural protections, it is even less plausible that they would be inhibited by a fear of erroneous false-statement findings.[4]

b. Respondents note that persons suspected of a crime can refuse to assist the government's investigation into their activities. Erickson Resp. Br. 17; Kye Resp. Br. 11; Walsh Resp. Br. 6. They argue that it would be unfair to deny federal employees suspected of misconduct a correlative right, and that federal employees therefore must be permitted to make false statements about their involvement in employment-related misconduct. *E.g.*, Kye Resp. Br. 11. This argument is fundamentally flawed.

The right to remain silent in the face of government questioning exists only when there is a risk of exposure to criminal penalties. See, *e.g.*, *Hale* v. *Henkel*, 201 U.S. 43, 67 (1906) ("The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a

[4] Respondent Erickson suggests (Br. 15-16) that criminal defendants have one additional protection that employees facing possible discipline do not: unless the factfinder finds guilt beyond a reasonable doubt on at least one count, criminal defendants will not be sentenced at all, and their false statements at trial cannot be used against them. Very few defendants, however, are likely to be confident that they will be acquitted on all counts. Defendants deciding whether to testify are thus in essentially the same position as employees questioned about allegations of misconduct: both run the risk of adverse consequences if found by a preponderance to have made false statements.

criminal charge."). Where truthful answers would tend to expose the speaker to other forms of injury, including job loss, there is no privilege to remain silent. See, *e.g.*, *Ullmann* v. *United States*, 350 U.S. 422, 430 (1956) (rejecting claim that defendant had Fifth Amendment privilege because truthful answers might lead to "loss of job, expulsion from labor unions, * * * [loss of] passport eligibility, and general public opprobrium"). This is true even if the purpose of the government's questioning is to ascertain whether one of its employees has engaged in employment-related misconduct.[5] See, *e.g.*, *Uniformed Sanitation Men Ass'n* v. *Commissioner of Sanitation*, 392 U.S. 280, 285 (1968) ("[P]etitioners, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights.").

Respondents apparently concede that employees can be required to answer questions about employment-related misconduct. Kye Resp. Br. 4; Walsh Resp. Br. 6. They argue, however, that requiring truthful answers would "place the employee in the position of assisting the agency in proving the charges against her while at the same time trying to *defend* against the charges."[6] Kye Resp. Br. 11. Although respon-

[5] In cases in which the alleged misconduct is criminal in nature, employees may have a Fifth Amendment privilege not to answer agency questions about the misconduct, unless they are granted immunity. Pet. Br. 31-32.

[6] As we explained in our opening brief (at 25-26), the false statement charges in the present cases all relate to statements made before any misconduct charges were brought against respondents. Respondent Erickson concedes this (Br. 20), but

dents view this as "irrational and illogical," *ibid.*, it is nothing of the sort. It is, for example, no different from the situation a defendant in a civil suit faces when being deposed. Although such a defendant has a right to defend against the lawsuit, that right does not carry with it the further right to make false statements during the deposition. If truthful answers to the questions posed in a deposition would damage a civil defendant's case—even fatally—the defendant is nevertheless obliged to give them. Although one could say that enforcing this obligation places civil

---

he and the other respondents repeatedly obscure the point by, for example, describing the present cases as involving employees who denied "charges" of misconduct. *E.g.*, Erickson Resp. Br. 22; Kye Resp. Br. 10; Walsh Resp. Br. 13. To conform to the facts of the present cases, the statement partially quoted in text should read: "Not allowing the employee to [falsely] deny [involvement in] misconduct would place the employee in the position of assisting the agency in [determining whether she engaged in misconduct] while at the same trying to [preserve her ability to successfully defend herself against charges of misconduct if such charges are ultimately brought]."

More fundamentally, respondents make no effort to explain how they could have a procedural due process right to make false statements during the agency's investigation, a point at which they have no procedural due process right to be heard at all. See Pet. Br. 25-26. Rather, respondents' due process rights did not arise until they were charged with misconduct and falsification, and each thereafter was granted procedural protections that were more than sufficient to meet the requirements of the Due Process Clause. See *id.* at 17-19 (tenured employees charged with misconduct are entitled under the Civil Service Reform Act of 1978, 5 U.S.C. 7501 *et seq.*, to pre-deprivation opportunity to be heard, post-deprivation evidentiary hearing before administrative judge, and extensive administrative and judicial review).

defendants "in the position of assisting the [plaintiff] in proving the charges against [them] while at the same time trying to *defend* against the charges," *ibid.*, respondents surely would not contend that such enforcement infringes upon the civil defendant's right to be heard or to defend against the lawsuit.[7]

---

[7] In this respect, civil defendants and federal employees charged with employment-related misconduct are situated very differently from criminal defendants. Criminal defendants, even if factually guilty, can rest upon their privilege against self-incrimination and require the government to attempt to prove guilt beyond a reasonable doubt without their assistance. Civil defendants and employees charged with employment-related misconduct typically have no such privilege, and can be required to provide truthful information, even if doing so will damage or destroy their chances of success in a civil trial or an administrative proceeding.

Respondents assert that a criminal defendant could not be prosecuted on the ground that his or her plea of not guilty was false. Erickson Resp. Br. 17; Kye Resp. Br. 11. We agree. Cf. *United States* v. *Endo*, 635 F.2d 321, 322-324 (4th Cir. 1980) (defendant who pleaded guilty, withdrew plea, and then pleaded not guilty could not be convicted for making false declarations under 18 U.S.C. 1623; statements that present legal conclusions are considered statements of opinion, rather than factual statements, and cannot be basis for perjury conviction). That principle, however, does not help respondents. This is not a case—nor are we aware of a case—in which a federal employee was disciplined for expressing the opinion that discipline was unwarranted, or for seeking administrative or judicial review of agency discipline. Respondents were disciplined for making specific and factual false statements to their employing agencies, and the fact that a criminal defendant could not be punished for pleading not guilty does not remotely support the conclusion that respondents should be constitutionally immune from employment sanction for their false statements. See *United States* v. *Garcia*, 780 F. Supp. 166, 173 (S.D.N.Y. 1991) (distinguishing *Endo* and holding that

There is nothing inappropriate or "irrational" about requiring employees asked about employment-related misconduct to answer truthfully, even if truthful answers would provide a basis for employment discipline. In fact, it is the contrary rule that is irrational. See *Walsh* v. *Department of Veterans Affairs*, 62 M.S.P.R. 586, 598 (1994) (Erdreich, Chmn., concurring) (granting federal employees constitutional right to make false statements has "the anomalous result that an employee may be required to respond to an agency inquiry, but may not be required to respond truthfully").

Finally, the fact that federal employees are obliged to answer questions about employment-related misconduct, while criminal defendants are free to refuse to answer questions about criminal conduct, does not justify bestowing on federal employees a right to make false statements. This Court's cases make that clear. Cf. *United States* v. *Wong*, 431 U.S. 174, 178 (1977) ("[E]ven the predicament of being forced to chose between incriminatory truth and falsehood, as opposed to refusing to answer, does not justify perjury."). See also *United States* v. *Knox*, 396 U.S. 77, 79-84 (1969); *Bryson* v. *United States*, 396 U.S. 64, 67-73 (1969).

2. Respondents claim that the ruling of the court of appeals extends only to "mere denials" of a charge of employment misconduct, or of the facts underlying such a charge, and that such denials are not false statements. Erickson Resp. Br. 12-14; Kye Resp. Br.

---

defendant was properly convicted of perjury for having answered "no" to questions about his criminal activities).

7; Walsh Resp. Br. 11-15. Respondents are mistaken on both counts.[8]

a. It is an elementary principle of logic that denials—even "mere denials"—are simply one form of statement. "To deny a statement is to affirm another statement, known as the *negation* or *contradictory* of the first. To deny 'The Taj Mahal is white' is to affirm 'The Taj Mahal is not white.'" W.V. Quine, *Methods of Logic* 9 (3d ed. 1972). To take another example, drawn from a decision of this Court, see *United States* v. *Woodward*, 469 U.S. 105 (1985), a defendant who answers "no" when asked whether he is bringing more than $5,000 into the country makes a "mere denial." In substance, however, that denial is logically equivalent to an assertion that the defendant is bringing $5,000 or less into the country. See 3 *Oxford English Dictionary* 193 (1933) (defining "denial" as "the assertion (of anything) to be untrue or untenable"); *Webster's Third New International Dictionary* 602 (1986) (defining "denial" as "assertion that something alleged is untrue"). In other words, for every denial there is a substantively identical assertion, and the difference between the two types of statement is entirely a matter of form.[9]

---

[8] Respondents' arguments on these points are similar in some respects to arguments made in support of the "exculpatory no" doctrine, the validity of which is presently before this Court in *Brogan* v. *United States*, cert. granted, 117 S. Ct. 2430 (1997) (No. 96-1579). See U.S. Brief at 20-22, *Brogan* v. *United States*, *supra*.

[9] Because the difference between denials and assertions is entirely a matter of form, respondents are plainly in error when they suggest that denials are intrinsically incapable of misleading an investigator or delaying an investigation. Walsh Resp. Br. 11; Kye Resp. Br. 7-8. For example, when an agency

b. It would be the purest exaltation of form over substance to make the question whether an employee had a constitutional right to make a false statement turn on the form in which the employee's false statement happened to be uttered.[10] See, *e.g.*, *Board of*

---

investigator is seeking to determine which of the agency's employees engaged in particular misconduct, one employee's false "mere denial" can quite easily mislead the investigator or delay the investigation.

Respondents also advance a variety of specific arguments as to why their particular false statements were not intended to, and did not in fact, mislead investigators or delay investigations. Kye Resp. Br. 8; Walsh Resp. Br. 12-13. These contentions are entirely unconvincing. There can be no question that respondents' false statements were intended to affect the course of the misconduct investigations, even if only by making it less likely that they would be found to have committed misconduct. See, *e.g.*, McManus Initial Decision 5 (No. AT-0752-94-0313-I-1) (MSPB May 26, 1994) (McManus admitted that in his original interview he "'may have skirted the issue' in an attempt to end the investigation"). Perhaps because proof of successful deception is not required under federal employment law, cf. *Naekel* v. *Department of Transp.*, 782 F.2d 975, 977-978 (Fed. Cir. 1986) (requiring proof of intent to deceive, not successful deception), the record contains very little direct information on the question whether respondents' false statements actually succeeded in deceiving investigators or delaying investigations. There are some indications, however, that respondents' false statements did mislead investigators or delay investigations. See, *e.g.*, Kye Initial Decision 2-6 (No. PH-0752-93-0524-I-1) (MSPB Nov. 12, 1993) (after respondent Kye denied misconduct in first interview, agency investigator conducted two additional interviews with her, one six days later); Pet. App. 25a-26a (after respondent McManus denied misconduct in first interview, agency investigator conducted additional interview with him three weeks later).

[10] If the form of the answer were dispositive, employing agencies would presumably attempt to ask their questions so that any false answer would likely be in the form of an assertion rather than a denial: rather than asking, "Did you build a pond for your supervisor during duty hours?", they would ask "Did you devote your entire workday to performing official duties?" Clever employees might react by trying to ensure that all of their answers took the form of denials rather than assertions: rather than answering the latter question by saying, "Yes, I performed only official duties," they might respond, "I did not spend time during the workday on matters other than official work." The question whether an employee has a constitutional right to make a false statement could not conceivably depend on the outcome of this entirely formalistic struggle.

County Comm'rs v. *Umbehr*, 116 S. Ct. 2342, 2349 (1996) ("In determining what is due process of law regard must be had to substance, not to form.") (quoting *Chicago, B. & Q. R.R.* v. *City of Chicago*, 166 U.S. 226, 235 (1897)). The court of appeals' disposition of the cases before it demonstrates as much. Although the court professed to limit its ruling to false denials, it refused to sustain the imposition of discipline as to statements that were indisputably couched as assertions. For example, respondent Kye's false claims that she had lost or destroyed the government credit card at issue were clearly in the form of assertions rather than denials. Pet. Br. 7. The court of appeals, however, refused to permit Kye to be disciplined for making those false assertions, because they were "in effect" denials. Pet. App. 23a. As we have already noted, all assertions are "in effect" denials (and vice versa). A rule that extends not only to denials but also to assertions that are "in effect" denials is a rule that is not limited at all.

The court of appeals also suggested that the right to make false statements would not extend to "false stor[ies]" or "tall tales." Pet. App. 17a. It is anyone's

guess, however, when or how a false statement becomes a false story. One might speculate that the length and the level of detail of the false statement would be significant factors, but the court of appeals' rulings in the present cases clearly reflect its view that even rather detailed false scenarios are not "false stor[ies]." For example, in any natural sense of the phrase, respondent Kye clearly told a "false story" when she falsely claimed that she had lost her government credit card, had regained possession of it, and had subsequently torn it up, and when she suggested she suspected her son was responsible for the misuse of the card. Pet. Br. 7; Kye Initial Decision 4-6. Nevertheless, the court of appeals held that Kye could not be disciplined for telling that false story. Pet. App. 23a. There is little reason to suppose that any meaningful limit would be imposed by the purported exclusion of "false stories" from the constitutional right to make false statements created by the court of appeals.[11]

The ruling of the court of appeals creates a broad right to lie for federal employees, and will seriously interfere with the ability of the federal government to investigate allegations of employee misconduct and to ensure the integrity of the federal civil service. Left

[11] As we explained in our opening brief (at 20-22), although the court of appeals identified other limitations on the scope of its ruling, none are at all reassuring. For example, all of the false statement charges at issue in the present cases related to statements that were made during agency investigations and before any charges were brought, which renders inexplicable the court of appeals' statement that employees would remain subject to discipline for false statements made in such circumstances. Respondents do not even acknowledge this discrepancy, much less attempt to explain or justify it.

undisturbed, the ruling of the court of appeals would call into question the constitutionality of other important disciplinary systems, including state civil-service systems and the system of attorney discipline.[12] Finally, the ruling of the court of appeals is contrary to this Court's consistent rejection of claims that the Constitution confers a right to lie.

* * * * *

For the foregoing reasons, and those stated in our opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Acting Solicitor General

OCTOBER 1997

[12] Respondents suggest that this observation exceeds the scope of the question presented. Erickson Resp. Br. 22-23; Kye Resp. Br. 16-17. To the contrary, when deciding specific questions, this Court routinely considers the implications that its ruling might have in other contexts. See, *e.g.*, *Williams* v. *United States*, 458 U.S. 279, 286 (1982) ("While the Court of Appeals addressed itself only to check kiting, its ruling has wider implications.").

(6)

No. 96-1395

In The
Supreme Court of the United States
October Term 1996

JAMES B. KING, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,
Petitioner,

VS.

LESTER E. ERICKSON, JR., ET. AL.
Respondents.

JAMES B. KING, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT,
Petitioner,

VS.

HARRY R. MCMANUS, ET. AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MOTION TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC. IN SUPPORT OF THE PETITIONER.

(List of Counsel on Inside Front Cover)

OF COUNSEL:

WAYNE W. SCHMIDT, ESQ.
Chair, Subcommittee on
Internal Affairs
International Association of
Chiefs of Police, Inc.
5519 North Cumberland Avenue
#1008
Chicago, Illinois 60656-1498

ELLIOT B. SPECTOR, ESQ.
Sack, Spector & Barrett
836 Farmington Avenue
West Hartford, Connecticut 06119

Counsel for Amicus Curiae

JODY M. LITCHFORD, ESQ.
Chair, Legal Officers' Section
International Association of
Chiefs of Police, Inc.
City Hall, Office of Legal Affairs
Orlando, Florida 32801
Tel. (407) 246-3480
Fax (407) 246-2854

JAMES P. MANAK, ESQ.
421 Ridgewood Avenue
Suite 100
Glen Ellyn, Illinois 60137-4900
Tel. and Fax (630) 858-6392
email: lelp@xnet.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 96-1395

In The
Supreme Court of the United States

October Term, 1996

JAMES B. KING, DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT,
Petitioner,

vs.

LESTER E. ERICKSON, JR., ET. AL.,
Respondents.

JAMES B. KING, DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT,
Petitioner,

vs.

HARRY R. MCMANUS, ET. AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MOTION TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC. IN SUPPORT OF THE PETITIONER.

This brief is filed pursuant to the Rules of the United States Supreme Court. Consent to file has been granted by Counsel for the Petitioner. Consent has also been received from Paul E. Marth, Counsel for Lester E. Erickson, Jr. Those

letters have been filed with the Clerk of this Court. As of the filing of this brief, consents have not been received from the other Respondents in this case. If they are subsequently received, the Clerk of this Court will be notified, the letters will be filed, and the motion will be withdrawn.[1]

The International Association of Chiefs of Police, Inc. moves this Court for leave to file the attached brief as *amicus curiae*, and declares as follows:

1. *Identity and Interest of Amicus Curiae.* The *amicus curiae* is described as follows:

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

2. *Desirability of an Amicus Curiae Brief. Amicus* is a professional association representing the interests of state and local law enforcement agencies at the national and international levels.

---

[1] As required by Rule 37.6 of the United States Supreme Court, the following disclosure is made: This brief was authored for the *amicus* by Jody M. Litchford, Esq., counsel of record; Elliot B. Spector, Esq.; James P. Manak, Esq. (also the motion); and Wayne W. Schmidt, Esq., Chair, Subcommittee on Internal Affairs, International Association of Chiefs of Police, Inc. No other persons authored this motion or brief. The International Association of Chiefs of Police, Inc., and Americans for Effective Law Enforcement, Inc., made the complete monetary contribution to the preparation and submission of this motion and brief, without financial support from any other source, directly or indirectly.

Because of the relationship with our members, and the composition of our membership and directors, including active law enforcement administrators and counsel at the national level, we are particularly aware of the impact of the ruling of the court below on the management and administration of law enforcement agencies at all levels of government as it relates to the discipline of personnel and the integrity of the law enforcement function. Without the ability of law enforcement management to effectively discipline personnel, the law enforcement function in this country will be seriously impaired. We respectfully ask this Court to consider this information in reaching its decision in this case.

3. *Reasons for Believing That Existing Briefs May Not Present All Issues.* IACP is an international and national association, and its perspective is broad. Although the parties clearly are represented by capable and diligent counsel, no single party can completely develop all relevant views of such policy issues.

4. *Avoidance of Duplication.* Counsel for *amicus curiae* has reviewed the facts of this case and has conferred with Counsel for the Petitioner in an effort to avoid unnecessary duplication. It is believed that this brief presents vital policy issues directly related to law enforcement management and administration that are not otherwise raised by the parties.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of the parties. The consent of Petitioner has been received. Consent has also been received from Paul E. Marth, Counsel for Lester E. Erickson, Jr. Those letters have been filed with the Clerk of this Court. As of the filing of this brief, consents have not been received from the other Respondents in this case.

For these reasons, the *amicus curiae* requests that it be granted leave to file the attached *amicus curiae* brief.

Respectfully submitted,

JAMES P. MANAK, ESQ.
421 Ridgewood Avenue, Suite 100
Glen Ellyn, Illinois 60137-4900
Telephone and fax: (630) 858-6392
email: lelp@xnet.com
Co-Counsel for Movant Party, Amicus Curiae

INTEREST OF *AMICUS CURIAE*

See Section on Identity and Interest of *Amicus Curiae*, *supra*.

STATEMENT OF THE CASE

The court below, *King v. Erickson, Jr., Et. Al.*, 89 F.3d 1575 (Fed. Cir. 1996), ruled that a federal government agency could not, consistently with the Fifth Amendment's Due Process Clause, charge an employee both with an employment-related misconduct charge and with making a false statement concerning the alleged misconduct based on the employee's denial of the charge or the facts underlying the charge.

SUMMARY OF ARGUMENT

Amicus contends that the issue before this Court is the existence of a constitutionally-protected "right to lie" by police officers and other public employees when questioned by their employer about circumstances related to their jobs. The Federal

Circuit Court of Appeals, relying on previous federal circuit precedent in *Grubka v. Department of Treasury*, 858 F.2d 1570 (Fed. Cir. 1988), held that the "right to lie" in such circumstances, is guaranteed by the due process clause of the Fifth Amendment. The International Association of Chiefs of Police urges this Court to strongly reject the rationale as well as the result reached by the Federal Circuit in the instant cases.

ARGUMENT

THE DUE PROCESS GUARANTEES OF THE UNITED STATES CONSTITUTION DO NOT PROVIDE GOVERNMENTAL EMPLOYEES WITH A PROTECTED RIGHT TO LIE WHEN REQUIRED TO RESPOND TO QUESTIONS NARROWLY AND DIRECTLY RELATED TO THEIR EMPLOYMENT.

Although the cases below were decided on the basis of the Fifth Amendment Due Process Clause, the decision of the court below, if sustained, will, through application of the Fourteenth Amendment, have far reaching impact on state and local police agencies, which commonly require truthfulness of law enforcement officers during internal affairs investigations as well as at other times. Had this case been decided on grounds unique to the federal merit service system, the decision would be merely unfortunate. *See, e.g., ABF Freight Systems v. National Labor Relations Board*, 510 U.S. 317 (1994). As decided on the basis of a constitutional guarantee of due process, however, it has the potential to wreak havoc on state and local criminal justice systems across the nation and, therefore, must be reversed.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), this Court recognized that the Constitution provides employees of the federal, state, and local government, who have a property interest in their jobs, with minimum due process requirements when those rights are infringed. The

Court identified the extent of the due process required by the Constitution in such cases, holding that prior to the implementation of the disciplinary action, due process requires only notice and an opportunity to be heard. The opportunity to be heard in this context was further described as simply an opportunity for the employee to present his side of the story. The Court recognized the limited nature of these rights but posited that "[t]o require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Loudermill*, 470 U.S. at 546.

Notwithstanding this restriction, the Federal Circuit in the instant cases extended the protections of the due process clause not only to the employer's investigatory interview practices but also to protect employees from subsequent adverse use of untruthful statements made to the employer during the administrative process. In broadening due process requirements in this unprecedented fashion, the Federal Circuit Court far exceeded the parameters established in *Loudermill*, and espoused a principle that will, indeed, intrude to an unwarranted extent on the government's responsibility to take appropriate action to investigate and deter employee misconduct.

The notion that the right to testify includes the right to testify untruthfully has been repeatedly rejected by this Court in criminal law cases. *United States v. Dunnigan*, 507 U.S. 87 (1993); *United States v. Havens*, 446 U.S. 620 (1980); *Harris v. New York*, 401 U.S. 222 (1971). The *Dunnigan* case, although arising in a criminal context, encompassed facts directly analogous to the cases under review. In *Dunnigan*, the defendant testified on her own behalf at trial, denying her participation in the alleged criminal conduct. The district court found this testimony to be untruthful and, following conviction, enhanced her sentence for the underlying criminal conduct on the basis of this perjury. This Court upheld the actions of the district court, reiterating that "a defendant's right to testify does not include a right to commit perjury." *Dunnigan*, 507 U.S. at

96. Similar to *Dunnigan*, the government employer in the instant cases additionally penalize employees for untruthfulness during the administrative investigation into their misconduct. Based on *Dunnigan*, this power cannot be held unconstitutional, and the Federal Circuit's holding to the contrary is erroneous. If due process does not encompass a right to testify untruthfully in a criminal case, then it certainly does not encompass such a right in an administrative hearing where constitutional safeguards are not as stringent.

The level of process due in any given situation is, inter alia, a function of the significance of the private interest affected by the action. *Gilbert v. Homer*, 117 S. Ct. 1807 (1997); *Mathews v. Eldridge*, 424 U.S. 319 (1976). At stake in the cases this Court has decided in the criminal context is obviously the liberty of the accused. Although this Court has consistently held that some type of process is required when a property, rather than a liberty, interest is involved, the requirement of due process in the property rights context is generally less rigorous. The interests in continued governmental employment at stake in the instant case, while not insignificant, do not approach the significance of the denial of liberty at issue in the *Harris*, *Havens*, and *Dunnigan* cases. If there is no due process right to testify untruthfully in those cases, as this Court has held, then there can be no due process right to untruthfulness in employment cases where lesser interests are at stake.

Moreover, the decisions by the Federal Circuit in these cases is in direct conflict with the earlier decisions of this Court in *Gardner v. Broderick*, 392 U.S. 273 (1968) and *Sanitation Men v. Sanitation Commissioner*, 392 U.S. 280 (1968). In these cases, this Court clearly held that public employees can be required, on pain of dismissal, to answer questions "specifically, directly, and narrowly relating to the performance of their official duties" so long as in so doing they are not required to waive their Fifth Amendment privilege against self-incrimination. *Sanitation Men*, 392 U.S. at 284. In reaching this result, the Court distinguished public employees from

others whose forced choice in this regard might raise different constitutional implications. The Court noted that a public employee is "directly, immediately, and entirely responsible to the City or State which is his employer. He owes his entire loyalty to it. . . . He is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer." *Gardner*, 392 U.S. at 278. The court further noted that "the policeman is either responsible to the State or to no one." *Id.* at 279. Herein lies the danger inherent in the decisions of the Federal Circuit. Police officers are entrusted by the government and ultimately by society at large with unparalleled power and authority. They are vested with the ability to bear arms and to deprive citizens of their liberty, their property and, under some circumstances, even their lives. Because of the exigencies inherent in their jobs, these powers often must be exercised under circumstances of great independence and little prior process or review. Certainly with respect to the employees occupying such positions of authority, the governmental employer must have the right to demand and enforce rules providing that only persons of the utmost integrity are so empowered.

Both the governmental employer and the greater citizenry have the right to establish and enforce rules related to the integrity of their law enforcement forces. To that end, police agencies commonly have rules requiring their personnel to truthfully answer questions that are narrowly and directly related to their job responsibilities. These rules generally apply whether the questions are asked by a supervisor in connection with a police operation or by a manager or internal affairs investigator inquiring into allegations of misconduct. To deny police agencies the ability to effectively investigate issues related to police misconduct unduly interferes with the effective and efficient operation of the department. More fundamental, by interfering with the department's ability to enforce and maintain the integrity of its operations and employees, this crippling erosion of internal investigating power will ultimately work to the detriment of all society.

In a large percentage, if not the majority, of police misconduct cases, investigators do not have sufficient objective evidence to sustain complaints. More often than not, it is the complainant's rendition versus the officer's. Without the ability to demand honest statements from officers, many complaints will remain unresolved. Today many officers will admit their misconduct because of their willingness to take responsibility for their actions, or because they know the disciplinary sanctions for untruthfulness will often be more severe than the sanctions for the underlying misconduct. Similarly, officers observing or having knowledge of fellow officers' misconduct will also truthfully respond to investigators' inquiries.

If the instant cases are upheld, peer pressure will ensure that participating and observing officers who may be subjected to discipline will deny involvement or knowledge of the underlying facts of the alleged misconduct. The law will breathe new life into and further validate the "Code of Silence" described in *Brandon v. Holt*, 469 U.S. 464, 467 (1995). This invigorated Code of Silence inevitably will lead to a reduction in the filing of complaints and cover-ups, and supervisors may be insulated from knowledge of wrongdoing by officers. As a result, police administrators will be restricted in their ability to discover misconduct.

It is not unreasonable to expect an officer to take responsibility for misconduct in the interest of protecting the public and maintaining the integrity of law enforcement. On the other hand, to allow an officer to lie during a misconduct investigation bears the potential for future constitutional violations. A municipal policy that permits officers to lie to avoid discipline, thereby preventing administrators from effectively investigating and correcting misconduct, can constitute deliberate indifference triggering municipal liability.

If police misconduct is not effectively monitored and controlled, the risk of constitutional violations increases. In balancing the interests implicated, it is clear that an officer's

right to avoid responsibility for misconduct by lying is far outweighed by government's obligation to protect the public from the potential harm of undeterred police misconduct.

Faith in the criminal justice system and all its elements is the keystone in the maintenance of an ordered society. If police officers cannot be trusted to tell the truth, then a fundamental underpinning of our system of justice is destroyed. If we accept that police officers will lie when confronted with difficult choices, then we are accepting a level of dishonesty that will ultimately destroy the effectiveness of law enforcement in all regards. Logically, an officer who will compromise the truth when answering questions related to his conduct is likely to compromise the truth in other circumstances. Even if we assume that an officer willing to lie under some circumstances can be trusted to tell the truth in court, under oath, the reality is that jurors will promptly discredit the testimony of an officer who is documented to have lied in previous administrative matters. The officer's credibility as a witness becomes completely undermined and, therefore, his effectiveness as a law enforcement officer is compromised. A law enforcement employer must, in such circumstances, be allowed to strongly discipline and ultimately discharge any employee whose credibility and integrity is destroyed by his or her untruthfulness.[2]

For these reasons, the International Association of Chiefs of Police urges this Court to clearly reject the position that there is or could be a constitutionally protected "right to lie" for police officers or, indeed, for public employees of any type.

---

[2] Ultimately, also, the inability to terminate an officer who is untruthful or otherwise dishonest will lead to departmental liability in subsequent civil actions.

CONCLUSION

Amicus urges this Court to reverse the decision of the court below on the basis of the precedents of this Court and sound judicial policy.

Respectfully submitted,

OF COUNSEL:

WAYNE W. SCHMIDT, ESQ.
Chair, Subcommittee on
Internal Affairs
International Association of
Chiefs of Police, Inc.
5519 North Cumberland Avenue
#1008
Chicago, Illinois 60656-1498

ELLIOT B. SPECTOR, ESQ.
Sack, Spector & Barrett
836 Farmington Avenue
West Hartford, Connecticut 06119

Counsel for Amicus Curiae

JODY M. LITCHFORD, ESQ.
Chair, Legal Officers' Section
International Association of
Chiefs of Police, Inc.
City Hall, Office of Legal Affairs
Orlando, Florida 32801
Tel. (407) 246-3480
Fax (407) 246-2854

JAMES P. MANAK, ESQ.
421 Ridgewood Avenue
Suite 100
Glen Ellyn, Illinois 60137-4900
Tel. and Fax (630) 858-6392
email: leip@xnet.com